92-610

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No.

In The

Supreme Court of the United States

October Term, 1992

ROY E. SHERMAN,

Petitioner,

vs.

WILLIAM F. LUDINGTON, CHASE PACKAGING CORPORATION, UNION CAMP CORPORATION,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court, sitting in diversity jurisdiction, and determining the preclusive effect of a prior judgment entered by a federal court, should apply the res judicata law of the state in which it sits.

2. Whether the application of the federal common law of res judicata by a federal court sitting in diversity jurisdiction is inconsistent with the *Erie* doctrine's requirement that federal diversity courts apply the substantive law of the state in which they sit.

> [Note: Petitioner reserves the right to argue Questions 3 and 4 in the event certiorari is granted on the above questions, but does not include Questions 3 and 4 among the reasons for the grant of certiorari].

3. Whether the district court, which applied the res judicata principles developed by the common law of the State of Ohio, erred when it concluded that the claims arising from the petitioner's termination of employment, which were the basis of a prior adverse judgment, and the misrepresentation claim asserted in a subsequent law suit were identical causes of action for purposes of res judicata.

4. Whether the court of appeals, which applied the res judicata law developed by the federal common law, erred when it concluded that the claims arising from the petitioner's termination of employment, which were the basis of a prior adverse judgment, and the misrepresentation claim asserted in a subsequent law suit were identical causes of action for purposes of res judicata.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Roy E. Sherman, and the respondents, William F. Ludington, Chase Packaging Corporation, and Union Camp Corporation.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Roy E. Sherman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 7, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit in the

above-entitled proceeding has been reported. It is reprinted in the appendix hereto, p. 1a, *infra*.

The memorandum opinion of the United States District Court for the Northern District of Ohio (Aldrich, D.J.) in the above-entitled proceeding has not been reported. It is reprinted in the appendix hereto, p. 51a, *infra*.

The opinion of the Court of Appeals for the Sixth Circuit in an earlier case involving some of the same parties, *Sherman v. Chase Packaging Corp.*, No. 90-4033, has not been reported. It is reprinted in the appendix hereto, p. 16a, *infra*.

The memorandum opinion of the United States District Court for the Northern District of Ohio (Batchelder, D.J.) in an earlier case involving some of the same parties, *Sherman v. Chase Packaging Corp.*, No. C89-1230, has not been reported. It is reprinted in the appendix hereto, p. 28a, *infra*.

STATEMENT OF JURISDICTION

Petitioner filed the instant action in the Cuyhoga County Court of Common Pleas in the State of Ohio. The respondents removed it to the United States District Court for the Northern District of Ohio pursuant to 28 U.S.C. § 1332. On September 10, 1991, the Northern District granted the respondents' motion for summary judgment. *See* p. 50a, *infra*.

On petitioner's appeals, the Sixth Circuit, on July 7, 1992, entered a judgment and opinion affirming the decision of the Northern District of Ohio. *See* p. 15a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Posession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

The dispute between petitioner, Roy E. Sherman, and the respondents, Chase Packaging Corporation, Union Camp Corporation, and William F. Ludington, has two sources. The first is petitioner's 26-years of employment in the management of the respondent Chase Packaging Corporation ("Chase"), and the

rights established by that work history that were violated when respondent Chase decided to terminate the petitioner. The second source is a phone conversation had one week after the termination between petitioner and respondent Ludington during which Ludington made certain representations regarding petitioner's future employment with Chase upon which the petitioner relied to his detriment. Ludington expressly told Sherman that he would be contacted as soon as an opening arose: "If one [a position] develops, you're the first guy I'm gonna call;" "I can give you the first call on anything that opens up, and I'll do that;" and "if . . . something else comes up here, I'll call you." The phone conversation in which the misrepresentations were made was tape-recorded.

On June 27, 1989, petitioner Roy Sherman filed a lawsuit regarding the respondent Chase's decision to terminate him. He alleged violations of the Age Discrimination in Employment Act, 29 U.S.C. § 623, and purposeful interference with employment benefits in violation of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144. The federal court exercised pendent jurisdiction over the state law claims as well, which alleged age discrimination under Ohio Revised Code § 4101.17, promissory estoppel, and negligent performance of contractual duties.

At the time this suit was filed, petitioner was unaware that openings had risen at Chase for which he was undisputedly qualified. Petitioner felt it unnecessary to re-contact Chase regarding work. He was relying on Ludington's representations that Ludington would contact him if a position became available. Ludington never contacted Sherman. Petitioner's reliance was detrimental because it left petitioner unaware of job openings at Chase. He never applied for these positions, and they were filled by other individuals.

Petitioner was unaware that Ludington's representations were fraudulent until he learned about the job openings during a deposition regarding the petitioner's pending wrongful discharge and discrimination claims. He subsequently moved to amend his complaint to add a claim for intentional and/or negligent misrepresentation.

Though the motion to amend was unopposed, the district court denied it, concluding that the misrepresentation claims "either were or should have been apparent to plaintiff's counsel at the outset of this case." *Sherman v. Ludington*, C89-1230, slip op. at 2 (N.D. Ohio October 22, 1990). The court never considered whether the defendants were prejudiced in any way by the proposed amendment.

In the same opinion, the court granted summary judgment to the defendants, and disposed of the petitioner's federal and state law claims. *Sherman v. Ludington*, C89-1230 (N.D. Ohio, October 22, 1990). Both decisions were affirmed on appeal. *Sherman v. Ludington*, 90-4033 (6th Cir. May 21, 1991).

While the appeal was pending, on March 21, 1991, petitioner filed the present suit in state court asserting only a state law claim of misrepresentation (hereinafter "*Sherman II*"). That lawsuit was filed within Ohio's four year statute of limitations. On April 10, 1991, it was removed to federal court on diversity grounds, the plaintiff being a citizen of Ohio and defendants variously being from Connecticut, Delaware and New Jersey. The respondents moved for summary judgment, arguing that the misrepresentation claim in *Sherman II* was barred by the doctrine of res judicata. The district court determined that the misrepresentation claim could have been asserted with the petitioner's other claims in *Sherman I*, and, purporting to be applying the res judicata law of the state of Ohio, concluded that petitioner's failure to assert the claim in *Sherman I* barred subsequent assertion of the claim.

On appeal, the Sixth Circuit Court of Appeals determined that a federal district court, sitting in diversity jurisdiction to adjudicate a cause of action arising solely fom the common law of the State of Ohio, must apply federal res judicata law. *Sherman v. Ludington*, No. 91-3936, slip op. at 8 (6th Cir. July 7, 1992). The court concluded that the misrepresentation claim, which arose from the post-termination phone conversation and respondent Ludington's subsequent conduct constituted the same cause of action as the discharge claims. As such, the court held that the doctrine of res judicata precluded its assertion in a subsequent lawsuit, and affirmed the granting of summary judgment. *Id.* at 16.

REASONS FOR GRANTING THE WRIT

I.

THE APPLICATION, BY THE SIXTH CIRCUIT COURT OF APPEALS SITTING IN DIVERSITY JURISDICTION, OF FEDERAL LAW OF RES JUDICATA TO A PRIOR JUDGMENT ENTERED BY A FEDERAL COURT CLEARLY CONTRADICTS THE HOLDING OF OTHER CIRCUITS.

The conflict and confusion existing between and within the federal courts of appeal regarding the choice of res judicata law to be applied by a federal court sitting in diversity jurisdiction leaves the courts and the bar standardless. It engenders unnecessary litigation. In the name of efficiency, courts in some circuits have used the doctrine of res judicata arbitrarily to dismiss potentially meritorious claims that in other circuits would survive. This Court's intercession is sought in this case to promote uniformity among the circuits, and to provide reasonable and consistent standards for the application, when appropriate, of a harsh but necessary tool for the administration of justice.

A federal court sitting in diversity jurisdiction faces a choice of law dilemma when a party to the litigation asserts that a prior judgment, entered by either a federal or a state court, precludes subsequent consideration of a claim, defense or factual issue. This Court has already determined that the full faith and credit statute, 28 U.S.C. § 1738, requires "that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56, 61 (1984)(citing *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415-16, 66 L.Ed.2d 308, 314 (1980), and *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L. Ed.2d 262, 270 (1982)). The full faith and credit statute, 28 U.S.C. § 1738, does not apply to federal judgments, however, and this Court has not confronted or considered directly the choice of law issues surrounding the preclusive effect to be given to a prior federal judgment by a federal court sitting in diversity jurisdiction.

The *Erie* doctrine has generated great confusion for the lower federal courts which, when confronted with a prior federal court judgment, must decide which principles of res judicata to apply to determine whether the prior federal judgment precludes subsequent litigation of related state law claims in diversity cases. A federal common law of res judicata[1] has developed and been applied in some circuits. Other courts, however, have held that state res judicata standards must be applied, looking either to the law of the state in which the rendering court sits, or to the law of the forum state.

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1. The terms res judicata and collateral estoppel have been the source of much confusion, leading some commentators to promote the use of the terms "claim preclusion" and "issue preclusion." The lower federal courts have confronted the choice of law issue presented by both issue and claim preclusion, and have held that the distinction is irrelevant in this context. *Johnson v. United States*, 576 F.2d 606, 611 (5th Cir. 1978) *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 369 (1981). This brief uses the term res judicata in its most general sense to refer to both issue and claim preclusion.

This Court has refused, in the past, to grant certiorari in cases in which the res judicata choice of law issue squarely has been presented. As a consequence, the development of alternative theories and the assertion of conflicting arguments have run their course. The circuits today are in direct conflict and in a state of confusion that deserves this Court's immediate attention.

In *Sherman v. Ludington*, No. 91-3936 (6th Cir. July 7, 1992), the Sixth Circuit held that a federal court exercising diversity jurisdiction must apply federal res judicata principles to the judgment of a federal court which exercised federal question jurisdiction. *Id.*, slip op. at 7-8. From its application of federal principles of res judicata, the court concluded that the disposition of the petitioner's federal and state age discrimination, ERISA, and breach of contract/promissory estoppel claims precluded him from litigating his misrepresentation claim in a subsequent action. *Id.* at 13. The proper[2] use of the res judicata standards developed in the common law of Ohio would have permitted the plaintiff to prosecute his related, but separate and distinct claim.

The Sixth Circuit's decision in *Sherman v. Ludington* is consistent with the Sixth Circuit's opinion in *Cemer v. Marathon Oil Co.*, 583 F.2d 830 (6th Cir. 1978) in which the court held that a federal court sitting in removal jurisdiction based on diversity of citizenship must apply federal res judicata law to determine the preclusive effect of a prior judgment of a federal court which sat in federal question jurisdiction. In addition, in *Silcox v. United Trucking Service, Inc.*, 687 F.2d 848 (6th Cir. 1982), the Sixth Circuit held that a federal court sitting in diversity jurisdiction

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2. Petitioner contends that the district court, which applied the res judicata law of the State of Ohio, did so in an incorrect manner. While this issue is not offered as a reason for granting certiorari, the petitioner has presented it as a question for this Court's review should this petition be granted.

must apply federal principles of res judicata to the prior judgment of a federal court which also sat in federal question jurisdiction. Under Sixth Circuit law, then, the preclusive effect of any judgment entered by a federal court must be determined by federal principles of res judicata, regardless of whether the rendering court exercised diversity or non-diversity jurisdiction.

The Sixth Circuit's position on the choice of preclusionary law to be applied to prior federal judgments is in direct conflict with the decisions of the Eighth and Ninth Circuit Court of Appeals. In *Lane v. Sullivan*, 900 F.2d 1247 (8th Cir.) *cert denied*, 111 S.Ct. 134, 112 L.Ed.2d 101 (1990), the Eighth Circuit, sitting in diversity jurisdiction, noted that "collateral estoppel in a diversity action is a question of substantive law controlled by state common law." *Id.* at 1250. Consequently, the court applied the principles of res judicata developed in the common law of the State of Arkansas to a prior federal judgment entered by a court which exercised diversity jurisdiction. *Id.* Similarly, in *Iowa Elec. Light and Power Co. v. Mobile Aerial Towers, Inc.*, 723 F.2d 50 (8th Cir. 1983), the Eighth Circuit, in another diversity case, held that the state common law must determine the issue of collateral estoppel because "[t]he substantive law to be applied . . . is state common law." *Id.* at 52 (citations omitted). *See also, McDonald v. Johnson & Johnson*, 776 F.2d 767, 769-70 (8th Cir. 1983) (preclusive effect of prior judgment of federal court in diversity jurisdiction "is an issue of substantive law requiring the application of state law in diversity actions.") *cert. denied*, 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984).

The Ninth Circuit requires that a federal court, sitting in diversity jurisdiction and considering the preclusive effect of a prior federal judgment, must apply the law of the state in which it sits. In *St. Paul Fire & Marine Ins. Co. v. Weiner*, 606 F.2d 864 (9th Cir. 1979), the plaintiff insurance company argued that a prior criminal conviction should have a collateral estoppel effect in a

subsequent diversity action. The court stated that "[t]he relevant substantive law is the California law pertaining to collateral estoppel." *Id.* at 868 (citations omitted). Because the forum state's law of collateral estoppel would not permit preclusion under these circumstances, the decision of the district court to apply collateral estoppel was reversed. *Id.* at 869. The holding in *St. Paul Fire* was utilized in *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.) *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982) where the plaintiffs raised federal and state claims in the first suit, and only state law claims in the second. *Id.* at 1200-01. The Ninth Circuit reiterated the rule "that a federal court sitting in diversity must apply the res judicata law of the state in which it sits." *Id.* at 1201.

The rules stated above are not inviolate, however, even within the same circuits. In *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982), the Eighth Circuit panel cursorily concluded that federal principles of res judicata had to be applied by a federal court sitting in diversity jurisdiction when that court considered the preclusive effect of a prior judgment entered by a federal court with federal question jurisdiction. *Id.* at 1105. In support of this decision, the court cited *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446 (8th Cir. 1979). Roach involved issues arising under the federal labor laws, however, and it was held that federal principles of res judicata applied because both the courts in both of the cases at issue exercised federal question jurisdiction. *Id.* at 448 n. 3. Still, the Eighth Circuit cannot have it both ways by requiring federal courts in diversity jurisdiction to apply federal principles of res judicata under the terms of *Poe*, and state rules of res judicata under *Lane*, *McDonald*, and *Iowa Electric*.

The Ninth Circuit exhibits similar confusion. Without any discussion of the existence of contrary authority within the circuit, the court in *Fireman's Fund Ins. Co. v. Int'l Market Place*, 773 F.2d 1068 (9th Cir. 1985), held that "[f]ederal law governs the collateral

estoppel effect of a federal case decided by a federal court." *Id.* at 1069 (citing *Blonder-Tongue Laboratories v. Univ. of Illinois Found,* 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)).[3] Despite the fact that the federal court in the subsequent case exercised diversity jurisdiction, this holding does not establish that the Ninth Circuit has changed the applicable rule. A different panel of the Ninth Circuit subsequently returned to the *Constantini* rule. "In a subsequent diversity action, however, the forum state's law applies to determine the preclusive effects of a previous judgment." *Bates v. Union Oil Co. of California,* 944 F.2d 647, 649 (1991) *cert. denied,* 112 S.Ct. 1761, 118 L.Ed.2d 424 (1992). The Ninth Circuit's position that a federal court in diversity jurisdiction must apply to a prior federal judgment the res judicata law that would be applied by a court in the state in which the federal court sits is in direct conflict with the law of the Sixth Circuit, which requires a federal court in diversity jurisdiction to apply to a prior federal judgment res judicata standards that have developed in the federal common law.

The positions of many of the other circuits also represent direct conflicts with the Ninth and Eighth Circuits' positions by

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3. *Blonder-Tongue* provides some support for the statement made in *Fireman's Fund.* "It has been held in non-diversity cases, since *Erie R. Co. v. Thomkins*, that the federal courts will apply their own rule of res judicata." *Blonder Tongue*, at 324 n. 12, 91 S. Ct. at 1440, 28 L Ed.2d at 797. This statement, and a similar one made in *Heiser v. Woodruff*, 327 U.S. 726, 731-33, 66 S. Ct. 853, 855-56, 90 L.Ed. 970, 975 (1946), derive from precedent of the United States Supreme Court in which federal law and Supreme Court precedent were applied without consideration of the choice of law conundrum. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940), and *Jackson v. Irving Trust Co.*, 311 U.S. 494, 61 S. Ct. 326, 85 L. Ed. 297 (1940). The absence of any consideration by the Ccourt of the complicated choice of law issues diminishes the impact such statements should have on the merits of this petition. The lower courts have made little use of them in determining which res judicata principles apply to federal judgments, so it is clear that the statements do little to abate the confusion surrounding the issue upon which the present petition is based.

applying federal rules of res judicata to all federal judgments. In the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits, federal res judicata law is applied to determine the preclusive effect of a federal judgment, regardless of the jurisdictional basis of either court, the involvement of important questions of state law in the application of res judicata, or the source of the legal right or cause of action asserted. *See Johnson v. SCA Disposal Services of England*, 931 F.2d 970, 974 (1st Cir. 1991) (federal court in diversity jurisdiction formally adopting the rule that "federal law of res judicata [sic] governs the effect of a prior federal judgment in a diversity case."); *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1164 (1st Cir.)(because prior judgment was issued by a federal court in federal question jurisdiction, federal court in diversity must apply federal res judicata to determine preclusive effect of prior judgment) *cert. denied*, 112 S.Ct. 69, 116 L.Ed.2d 44 (1991); *Kern v. Hettinger*, 303 F.2d 333, 340 (2nd Cir. 1962)(federal law must determine the scope of federal judgments); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 715 (5th Cir.) (federal diversity court applies federal res judicat law to federal question court) *cert. denied*, 423 U.S. 908, 96 S. C 210, 46 L. Ed. 2d 137 (1975); *Stovall v. Price Waterhouse Co.*, 6' 2 F.2d 537, 540-41 (5th Cir. 1981)(federal diversity court must apply federal rules of res judicata to judgment of federal diversity court); *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 862 (5th Cir. 1989); *Seven Elves, Inc. v. Eskenazi*, 704 F.2d 241, 243-44, n. 4 (5th Cir. 1983); *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984) ("When a federal court sitting in diversity examines the collateral estoppel or res judicata effect of a prior federal judgment, based either on diversity or a federal question, it must apply federal common law.") *cert. denied*, 469 U.S. 1191, 105 S.Ct. 966, 83 L.Ed.2d. 970 (1985).

While the Seventh Circuit appears to have joined the majority of circuits in applying federal res judicata law, it has provided little explanation for the positions it has taken or its decisions

subsequently to change those positions. In *Morgan v. Inter-Continental Trading Corp.*, 360 F.2d 853 (7th Cir. 1966) and *Gasbarra v. Park-Ohio Ind., Inc.*, 655 F.2d 119 (7th Cir. 1981), the courts summarily stated that state rules of res judicata dictate the preclusive effect of prior federal judgments. Without explanation, the choice of law rule was changed in *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 525 (7th Cir. 1985)("Federal courts apply federal principles of preclusion . . ."). In the Seventh Circuit it appears certain that federal res judicata principles apply whenever the judgment that is the subject of the assertion of collateral estoppel was rendered by a federal court. *See Matter of Energy Co-op, Inc.*, 814 F.2d 1226, 1230 (7th Cir.) *cert. denied*, 484 U.S. 928, 108 S. Ct. 294, 98 L. Ed. 2d 254 (1987); and *Barnett v. Stern*, 909 F.2d 973, 977 (7th Cir. 1990).

Inasmuch as the Eighth and Ninth Circuits apply the res judicata law of the state in which the federal court sits, there is a direct conflict between the Ninth Circuit's approach to the choice of res judicata law and the approach adopted by the First, Second, Fifth, Seventh and Eleventh Circuits.[4]

The conflict between the Eighth and Ninth Circuits and some of the remaining circuits is less direct. The Fourth Circuit has determined that the scope of federal judgments is governed by federal res judicata principles regardless of the bases of federal jurisdiction of either the rendering or subsequent courts. *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989). Courts within the circuit also have recognized, in theory, that the

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4. The decision in *Poe, supra*, 695 F.2d 1103 (8th Cir. 1982) to apply federal principles of res judicata clouds the choice of law rule in the Eighth Circuit, but demonstrates the confusion that, in the absence of guidance from this Court, exists within the circuits as well. The Eighth Circuit stands in direct conflict with the majority of circuits because the weight of decisions in that circuit has held that state principles of res judicata determine the scope of a prior federal judgment.

application of federal res judicata principles in some cases may affect important questions of state law which go "'to the stability of legal relationships,'" and thereby necessitate the application of state rules of res judicata. *Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986) (*quoting Restatement (Second) of Judgments* 87 comment b (1980) *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987)); *accord, Brooks v. Arlington Hosp. Ass'n*, 850 F.2d 191, 195 (4th Cir. 1988).

In *Federal Insurance Co. v. Gates Learjet Corp.*, 823 F.2d 383 (10th Cir. 1987), the Tenth Circuit applied state law of res judicata to a prior federal judgment.

> In this case, where the question is whether there is privity between the parties in different diversity suits, a federal court must employ state rules of privity. We agree that "the concept of 'privity' in *res judicata* doctrine reflects a distinctly substantive policy, because privity arises from 'considerations going to stability of legal relationships — not unlike definitions of property.' " *Spiker v. Capitol Milk Producers Coop, Inc.*, 577 F.Supp. 416, 418 (W.D. Va. 1983) (quoting Restatement (Second) Judgments § 87 comment b (1980)); accord 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4472 (Supp. 1986) (state law should determine whether there is privity between the parties in federal diversity suits).

Id. at 386. Subsequently, the Tenth Circuit limited *Gates*, and concluded that federal res judicata principles must be applied unless an important question of state law, such as privity, was involved. *Petromanagement Corp. v. Acme-Thomas Joint Venture,*

835 F.2d 1329, 1333 (10th Cir. 1988) (adopting approach of *Restatement (Second) of Judgments* § 87).[5]

The choice of res judicata law in the last two circuits is in a state of confusion. In *Gambocz v. Yelencsics*, 468 F.2d 837 (3rd Cir. 1972), the Third Circuit held that a federal court in federal question jurisdiction must apply federal rules of res judicata to a prior judgment of another federal court in federal question jurisdiction. *Id.* at 841 n. 4. In *dicta*, the court noted that state rules may apply under an *Erie* analysis if the jurisdictional basis of either the rendering or the subsequent court were diversity. *Id.* In a subsequent case, the court stated that a federal court in diversity jurisdiction must apply state rules of res judicata unless a federal question is presented in the case as well. *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 F.2d 583, 597 (3rd Cir. 1975). This would appear to present a direct conflict with the rules applied by the majority of circuits, including the rule applied by the Sixth Circuit in *Sherman v. Ludington.* The statement clearly is *dicta,* however, since the court concluded that the same result would follow from the application of either the federal or the state res judicata laws. *Id.* The uncertain nature of the Third Circuit's approach was acknowledged in *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962–63 (3rd Cir. 1991). Once again, the court was unable to resolve the confusion within the circuit because it concluded that the application of federal and state rules of res

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5. The last case from the Tenth Circuit which considered the choice of law issue surrounding the preclusive effect to be given to prior federal judgments concluded that the federal and state laws were identical in the critical standards applicable to the case before it, thus obviating the need to make a choice. *American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1482, 1484-85 (10th Cir. 1991) *vacated on other grounds*, 946 F.2d 1489 (1991). The panel stated, however, that it believed the circuit was progressing toward adoption of a rule which would require that the preclusive effect of all federal judgments be determined by federal principles of res judicata, "except where the matter is distinctly substantive." *Id.* at 1485.

judicata would produce the same result. *Id.* at 963.[6]

In the District of Columbia Circuit, it was first held that *Erie* and the Full Faith and Credit Clause of the Constitution, as supplemented by the full faith and credit statute, 28 U.S.C. § 1738, "require a federal court exercising diversity jurisdiction in forum II to give to a judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least* in the absence of an overriding federal interest." *Semler v. Psychiatric Inst. of Washington, D.C.*, 575 F.2d 922, 927-28 (D.C. Cir. 1978) (emphasis in original). *Accord Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 851 n. 17 (D.C. Cir. 1981) (federal court in diversity airplane crash case "must look to local law to determine whether collateral estoppel may be employed.") *cert. denied*, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1981). A subsequent court from the District of Columbia Circuit reached an opposite conclusion and held that a federal court in diversity jurisdiction must apply federal principles of res judicata to a prior judgement of another federal diversity court. *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496-97 (D.C. Cir. 1983) (joining "a burgeoning majority of federal courts" without discussion of contrary precedent within the District of Columbia Circuit).

The court in *Answering Service, Inc. v. Egan*, 728 F.2d 1500 (D.C. Cir. 1984) attempted to harmonize the conflicting holdings in *Semler* and *Hunt*. The *Egan* court held that "*Erie* requires the use of *all* of a state's substantive law— including those aspects of

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6. The court cited cases in which state res judicata law has been applied but either without consideration of the choice of law issue, or prior to *Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958) and *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965) in which the application of the *Erie* doctrine was clarified. *Lubrizol*, 929 F.2d at 962-63.

its res judicata and preclusion law that can be characterized as substantive — whenever the cause of action at issue is state created." *Id.* at 1506.

Whatever the law in the Third and District of Columbia Circuits may be on the issue of the choice of res judicata law to be applied to federal judgments, the courts' willingness to consider whether questions of substantive state law necessitate the application of state res judicata principles makes their approach to the choice of law question inconsistent with the absolute rule adopted in the First, Second, Fifth, Sixth, Seventh and Eleventh Circuits which requires that federal res judicata standards determine the preclusive effect of federal judgments.

A summary of the various circuits' approaches to the choice of res judicata law demonstrates the confused and contradictory condition in which the federal diversity courts find themselves when considering the preclusive effect a prior federal court judgment must be given. The majority of courts apply a federal standard. Some courts consider whether important state rights are implicated. Still others are in a state of utter intramural confusion. This state of affairs severly prejudiced the petitioner and it prejudices all who use the legal system to resolve disputes.

As with any rule of law, uncertainty regarding the application of the doctrine of res judicata breeds added litigation and permits its misapplication. Not only must the parties and courts research, brief, argue and decide the proper manner in which the preclusion doctrines are to be applied, they also must battle over complicated issues of choice of law. The res judicata standards are complicated enought to apply. The addition of a bewildering choice of law analysis obscures the res judicata standards and provides too much opportunity for summary disposition of meritorious claims in the name of efficiency.

The uncertainty surrounding the choice of the res judicata law to be applied by federal courts in diversity jurisdiction deprives the doctrine of the efficiency that provided its luster, and replaces it with a dark, ominous cloud that menaces litigants possessing legitimate claims. This conflict and confusion provide a most compelling reason for this Court to grant this petition for certiorari.

II.

BECAUSE INEQUITABLE ADMINISTRATION OF JUSTICE RESULTS, AND BECAUSE FORUM SHOPPING IS ENCOURAGED, THE APPLICATION, BY A FEDERAL COURT SITTING IN DIVERSITY JURISDICTION, OF FEDERAL STANDARDS OF RES JUDICATA TO DETERMINE THE PRECLUSIVE EFFECT OF A PRIOR FEDERAL JUDGMENT IS INCONSISTENT WITH THE HOLDINGS, RATIONALES AND POLICIES OF *ERIE R. CO. V. THOMKINS,* 204 U.S. 311 (1938) AND ITS PROGENY.

The federal diversity court's application of res judicata standards that were developed by the federal common law to preclude the petitioner from litigating his state law claim deprived the petitioner of his day in court. The Sixth Circuit, as a federal court sitting in diversity jurisdiction, was required to apply the substantive law of Ohio, the state in which the district court sat and heard the petitioner's claim. The application of federal res judicata standards affected the petitioner's substantive state law rights to be free from misrepresentation, and was inconsistent with this Court's prior choice of law rulings.

The choice of law of a federal court sitting in diversity jurisdiction is governed by *Erie R. Co. v. Thomkins*, 204 U.S. 311, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) and its progeny. It is axiomatic to state that, under *Erie*, federal courts in diversity jurisdiction

have two sources of law. While they apply federal procedural rules, the substantive rights of the parties must be governed by the substantive law of the state in which the diversity court sits.

The *Erie* court was concerned that the application of federal common law to the determination of parties' substantive rights "rendered impossible equal protection of the law." *Erie R. Co.*, 204 U.S. at 74-75, 58 S. Ct. at 820-21, 82 L. Ed. at 1192. The development of a unique substantive federal common law provided the individual with diverse citizenship with the ability to invoke diversity jurisdiction and take advantage of potentially favorable federal common law. The non-diverse citizen did not possess a similar choice and an unequal administration of justice resulted. The application of federal common law by federal courts sitting in diversity jurisdiction also encouraged diverse litigants to "forum shop," and pick the jurisdiction, state or federal, that offered the law most favorable to the litigant's position. Inequitable administration of justice and forum shopping would not result if litigation in either the federal or the state forum would yield the same result, so federal courts in diversity jurisdiction were required to apply the substantive law of the state in which they sat.

The distinction between substantive and procedural law proved to be elusive, and subsequent Supreme Court opinions struggled to provide an appropriate standard to guide lower courts and the bar. The outcome determinative test of *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079 (1945), gave way to the interest analysis of *Byrd v. Blue Ridge Rural Elec. Cooperative*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958), but was rejuvenated, refurbished and reconditioned in *Hanna v. Plumer*, 380 U.S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). "The 'outcome determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the

laws." *Id.* at 468, 85 S. Ct. at 1142, 14 L. Ed. 2d at 15. The *Erie* doctrine, therefore requires the federal court sitting in diversity jurisdiction to apply the substantive state law only when the results from the application of the federal law, instead of state law, is different enough to arouse equal protection concerns and influence the litigants' choice of forum. *Id.* at 468, 85 S. Ct. at 1142, 14 L. Ed. 2d at 15.

The choice between federal and state res judicata standards frequently is outcome determinative, as it was for the petitioner. For example, under an application of the "primary right-primary duty" test analyzed in petitioner's appellate brief to the Sixth Circuit, *see* p. 59a, *infra,* to the facts presented by *Sherman v. Ludington,* it is evident that the petitioner's misrepresentation claim, which arose from a post-termination telephone conversation, is separate and distinct from the earlier claims against the respondents, which arose from the termination itself. The federal "identity of facts, evidence and remedy" standard employed by the Sixth Circuit, however, is looser. It promotes the ready use of the harsh doctrine of res judicata by permitting the federal courts to find an identity of causes of action when the parties' rights and obligations at issue actually are quite different.

A diverse defendant seeking to avoid litigation on the merits of a claim would seek out the federal courts that are more liberal in their use of res judicata. A non-diverse defendant, on the other hand, would not have that option. The inequitable administration of justice feared by the *Erie* court is thus realized by the outcome determinative nature of the application of federal res judicata standards, as the diverse defendant shops the federal and state forums to ascertain which forum offers the best chances of short circuiting a potentially meritorious claim.

Each time the federal standards of res judicata are employed by a federal court sitting in diversity jurisdiction, and each time the

federal standard is more permissive than the standard that would be applied by a court of the state in which the federal court sits, a plaintiff loses a fundamental right he would still possess, but for the vagaries of the diverse citizenship of the parties. Such disparate results that depend upon a diverse defendant's choice of forum violate the policies enunciated in *Erie*. This Court should grant this petition to enforce the *Erie* doctrine in the area of choice of res judicata law to prevent additional inequitable applications of justice.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. If the petitioner is correct that the Sixth Circuit erred by applying federal res judicata law in this diversity action, the Court should review the manner in which the lower court applied the res judicata law developed by the common law of Ohio. Alternatively, the matter should be remanded to the Sixth Circuit for review of the manner in which the district court applied the res judicata law of the State of Ohio, as requested by the petitioner in its original appeal.

If, however, the Court determines that it is consistent with the *Erie* doctrine for the res judicata law developed by the federal common law to be applied by a federal court which is exercising diversity jurisdiction, the Court should review the manner in which the federal law was applied by the Sixth Circuit Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A - PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 7, 1992

No. 91-3936

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY E. SHERMAN,

Plaintiff-Appellant,

v.

WILLIAM F. LUDINGTON; CHASE PACKAGING CORP.; UNION CAMP CORP.; BAG MERGER CORP.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

BEFORE: JONES and NORRIS, Circuit Judges, and WOODS, District Judge.*

PER CURIAM.

Plaintiff-appellant, Roy E. Sherman, appeals the district court's grant of summary judgment to defendants-appellees, William F. Ludington; Chase Packaging Corp.; Union Camp Corp.;

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* The Honorable George E. Woods, United States District Judge for the Eastern District of Michigan, sitting by designation.

and, Bag Merger Corp., on plaintiff's claims for intentional and/or negligent misrepresentation. The district court determined that Ohio res judicata principles bar plaintiff's claims. For the following reasons, we affirm the result of the district court judgment, but rely on the federal doctrine of res judicata to reach that conclusion.

I.

Plaintiff-appellant, Roy E. Sherman, an employee of Chase Packaging Corp. for twenty-six years, was terminated from his job as Chase's Chagrin Falls, Ohio office manager, effective on or about January 6, 1989. In June, 1989, Sherman brought a suit in federal district court against Chase Packaging Corp. alleging federal claims of age discrimination and denial of pension and employment benefits. *Sherman v. Chase Packaging Corp.*, No. 89-CV1230 (N.D. Ohio, June 27, 1989) ("*Sherman I*") (Jt. App. pp. 7-11). The Court took jurisdiction over the federal questions as well as pendant claims for age discrimination under Ohio law, wrongful discharge, negligent performance of contractual obligations, and promissory estoppel.[1] Chase Packaging Corp. moved the Court for summary judgment on September 11, 1990. Seventeen days before trial, appellant motioned for leave to amend the complaint. Eleven days before trial, plaintiff moved for leave to file a second amended complaint to dismiss the claim for negligent contractual performance and add state law claims for intentional and/or negligent misrepresentation. Appellant offered a transcribed January 13, 1989 telephone conversation between Sherman and William Ludington, the President of Chase Packaging Corp., as a

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1. The federal age discrimination and unlawful discharge claims are covered within 29 U.S.C. §§ 621-634. The interference with employee rights claim invokes ERISA, 29 U.S.C. § 1140. The state age discrimination claim is based in Ohio Revised Code § 4101.17.

basis for the amended claims. In the conversation, Ludington is purported to have told Sherman:

> I'll try to help you. I haven't got a job to give you at Chase. I won't fool you. If one comes up, you're gonna be the first guy I'm gonna call for it, but I can't create one. I just can't create a job just because its what I'd like to to (sic) give you employment.

(Jt. App. p. 33). The district court denied appellant's motions on the eve of trial, finding that the facts that formed the basis of the new claims, i.e., the January, 1989 phone conversation, "either were or should have been apparent to plaintiff's counsel at the outset of this case." *Sherman v. Chase Packaging Corp.*, No. 89-CV-1230, slip op. (N.D. Ohio, Oct. 22, 1990) (Jt. App. pp. 154-155). In that same opinion, the Court granted defendant's motion for summary judgment. (Jt. App. pp. 174). Plaintiff then appealed to this Court. This Court affirmed the district court judgment. *Sherman v. Chase Packaging Corp.*, No. 90-4033, slip op. (6th Cir. May 21, 1991) (Jt. App. p. 176). This Court agreed that because the January, 1989 Ludington-Sherman telephone conversation:

> occurred *five months prior* to the filing of the original complaint . . . the facts which formed the basis of plaintiff's 'new claims' were known to him from the time the original complaint was filed and should have been apparent from the outset.

(Jt. App. p. 179). The Court explained that plaintiff's motions made so close to trial could be and were properly denied because of the absence of new facts (Jt. App. p. 178).

Appendix A

While the appeal was pending before this Court, plaintiff filed a second action in Ohio state court alleging intentional and/or negligent misrepresentation based on Ludington's January, 1989 telephone conversation with Sherman.[2] The matter was removed to federal district court based on diversity. *Sherman v. William F. Ludington et.al.*, No. 91-CV-0673 (N.D. Ohio, March 21, 1991) ("*Sherman II*") (Jt. App. p. 13). Defendants jointly motioned the Court for summary judgment. (Jt. App. p. 58). The Court, relying on Ohio res judicata principles, granted defendants' motion. *Sherman v. William F. Ludington. et. al.*, No. 91-CV-0673, slip op. (N.D. Ohio, Sept. 10, 1991) (Jt. App. p. 305). It is from this judgment that plaintiff now appeals.

II.

In *Sherman I*, the district court enjoyed jurisdiction over the federal question claims and pendent state law claims. The district court in *Sherman II* enjoyed jurisdiction over appellant's claims of intentional and negligent misrepresentation because of diversity of citizenship. Relying on the language found in *Hackler v. Indianapolis & Southeastern Trailways*, 437 F.2d 360 (6th Cir. 1971) and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1985), the *Sherman II* Court applied Ohio res judicata law, barring plaintiff's cause of action and granting defendants' motion for summary judgment on that ground. In their brief, appellees first questioned whether federal res judicata principles should, in fact, govern this particular situation. Appellant did not respond to this inquiry. At oral argument, this Court requested both parties to submit supplemental briefs arguing their position on the proper res judicata principle to apply.

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2. Union Camp Corp. and Bag Merger Corp. are included, as defendants, in the second action as a result of their alleged merger or acquisition of Chase Packaging Corp. Chase Packaging President William F. Ludington is included as a defendant under the theory of respondeat superior.

Appendix A

Appellant cites *Hackler* and *Federal Insurance Co. v. Gates Learjet Corp.*, 823 F.2d 383 (10th Cir. 1987), and urges that the *Erie* doctrine requires the application of Ohio res judicata law in diversity cases before a federal district court. Appellees insist that persuasive authority indicates that a judgment given by a federal court acting under federal question jurisdiction is to receive federal res judicata examination in a later action. Following review of the briefs and the law, this Court concludes that the district court's decision to utilize Ohio law, instead of federal law, was improper.

This Circuit has supported the use of federal res judicata principles where a plaintiff, initially in federal court on a federal claim, later brought a diversity suit. *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978). The *Cemer* Court announced that federal law controls the effect of an earlier *federal judgment. Id.* at 832. This Circuit has also determined that federal res judicata is proper against federal decisions that originated with diversity jurisdiction. *Silcox v. United Trucking Service Inc.*, 687 F.2d 848 (6th Cir. 1982).[3]

Other circuits have agreed that federal res judicata properly

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3. The means by which parties come within federal jurisdiction, whether it be through diversity or federal question, should not weigh heavily in determining which law of res judicata to apply. In *Kern v. Hettinger*, 303 F.2d 333 (2d Cir. 1962), a case that considered the effect of res judicata from a federal decision in a diversity action, the Court said:

> One of the strongest policies a court can have is that of determining the scope of its own judgments . . . It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. . . .

Id., at 340.

applies when the earlier suit involved a federal claim and resulted in a federal judgment. *Kale v. Combined Insurance Company of America*, 924 F.2d 1161 (lst Cir. 1991), *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982), *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983). Of particular significance is the recent First Circuit opinion in *Kale* ("*Kale II*"). In his first suit ("*Kale I*"), the plaintiff invoked federal question jurisdiction under the Age Discrimination in Employment Act ("ADEA") and brought related state law claims under pendent jurisdiction. The *Kale I* Court granted summary judgment for defendant and dismissed the ADEA claim. The *Kale I* Court then dismissed the state law claims. When the plaintiff later brought state claims into federal court through diversity jurisdiction, the *Kale II* Court stated:

> While the parties do dispute whether the other state-law claims pleaded in *Kale II* were "brought" in *Kale I*, we need not enter that debate. The judgment in *Kale I* was rendered by a federal court acting under its federal question jurisdiction. Hence, the availability of a res iudicata defense in this case depends on the federal-law standard. *See, e.g., Cemer*, 583 F.2d at 832.

Kale, 924 F.2d at 1164. Whether or not all of plaintiff's claims were actually pleaded in *Kale I*, the *Kale II* Court invoked the doctrine of federal res judicata. The *Kale II* Court said, simply:

> [T]he disposition of the ADEA claim in *Kale I* comprised a suitable springboard for the deployment of res judicata.

Id. at 1164.

Appendix A

Appellant's contentions that Hackler and Gates mandate the use of state law res judicata are unpersuasive. Hackler, as well as *Migra*, stand for the proposition that state law collateral estoppel principles apply when the second cause of action is based on diversity and the first action has yielded a *state law judgment*. The cases do not, however, address the proper preclusionary rule when the original judgment is entered in federal court, as is the case here. Furthermore, the *Gates* decision is expressly limited to a situation far different then that presented here. In *Gates*, the Tenth Circuit proclaimed:

> We do not announce a broad rule regarding whether state law or federal law should determine the preclusive effect of a federal diversity court judgment. In this case, where the question is whether there is privity between the parties in different diversity suits, a federal court must employ state rules of privity.

Gates, 823 F.2d at 386. The issue in *Sherman* does not involve privity. Due to the self-imposed restriction, *Gates* has no application here.

Appellant also argues that the authority of *Silcox*, *Poe* and *Nilsen* do not apply in the instant matter because those cases are limited to situations where plaintiff essentially pleads the same claim in the subsequent action. Specifically, appellant insists that the pleading of a separate and unrelated claim from that asserted in the earlier suit, in this case, intentional and/or negligent misrepresentation, precludes following the authority of *Silcox*, *Poe* and *Nilsen*.

There is no clear formula for determining when a subsequent suit is barred by res judicata when a party, such as appellant here,

argues that it is presenting a separate and unrelated claim. This Court is, however, comfortable relying on the authority of *Kale* in asserting that the failure or decision not to plead a particular claim in the earlier suit should not bear on the determination of which rule of law to apply. *Kale*, 924 F.2d at 1164.

In the instant action, plaintiff included federal question and ancillary state law claims in his first suit. The federal district court granted summary judgment and dismissed all of the pleaded claims. When the plaintiff later brought a further claim, the lower court was obligated to follow the rationale of *Kale* and *Cemer* and apply federal res judicata principles.

III.

The standard for deciding a motion for summary judgment is well-established. Review of the grant or denial of summary judgment by this Court is governed by the same standard. *Hines v. Joy Mfg. Co.*, 850 F.2d 1146, 1149 (6th Cir. 1988). Pursuant to Fed. R. Civ. Proc. 56(c) a motion for summary judgment is to be granted only if the evidence indicates that no genuine issue of material fact exists. In order to avoid summary judgment, the opposing party must have set out sufficient evidence in the record to allow a reasonable jury to find for him at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The sufficiency of the evidence is to be tested against the substantive standard of proof that would control at trial. *Anderson*, 477 U.S. at 248. The moving party has the burden of showing that there is an absence of evidence to support the non-moving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is

a genuine issue for trial." *Anderson*, 477 U.S. at 256. In disposing of a motion for summary judgment, this Court must consider the evidence in the light most favorable to the non-moving party, but may weigh competing inferences for their persuasiveness. *Matsushita*, 475 U.S. at 587-588. Review is limited to consideration of those materials that were before the lower court when it granted summary judgment to the defendant-appellee.

IV.

Application of federal res judicata requires a finding of certain essential elements, namely: 1) a final judgment on the merits of the earlier action; 2) identity of the cause of action in both the earlier and later suits; and 3) the identity of the parties or privies in the two suits. *Kale*, 924 F.2d at 1165. Two of the three elements are in evidence without dispute. In the instant case, summary judgment of *Sherman I* satisfactorily acts as a final judgment on the merits and fulfills the first requirement. In addition, the parties in both actions are either the same or privies, thereby fulfilling the third criteria. Therefore, the sole dispute involves whether the two suits amount to the same cause of action.

This Court concurs in the *Kale* Court's concession that "the phrase 'identity of cause of action' is more easily stated than defined." *Kale*, 924 F.2d at 1166 (citation omitted). The *Kale* Court does, however, provide a helpful and detailed discussion to identify a single "cause of action." Specifically, the Court said:

> if the claims asserted in [the two suits], . . . were sufficiently related, that is, if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic

> wrong, the two suits advanced the same cause of action notwithstanding any differences in remedies sought or theories of recovery pleaded.

Id. at 1166. Plaintiff argues that his second lawsuit sets forth a fraud subsequent to a discharge claim which is quite different from either of his earlier breach of contract or wrongful discharge claims. Plaintiff also insists that the facts and evidence giving rise to the *Sherman II* claims are separate and distinct from the facts and evidence required to prove the *Sherman I* claims. A review of the pleadings and orders reveals that *Sherman II*, albeit presenting a facially distinct theory of recovery from *Sherman I*, is the same cause of action as *Sherman I*.

To invoke federal res judicata, "there must be . . . an identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Westwood Chemical Co. Inc. v. Kulick*, 656 F.2d 1224 (6th Cir. 1981). The most difficult determination to make is whether the facts and evidence necessary to proceed with *Sherman II* are the same as in *Sherman I*.

In *Sherman I*, plaintiff argued, among other claims, age discrimination, breach of promise, and negligent contractual performance. All the claims related to Sherman's discharge from Chase Packaging Corp. In support of these claims, plaintiff alleged misrepresentations concerning his employment status. Indeed, in his brief in opposition to Chase Packaging Corp.'s motion for summary judgment and as an example of these misrepresentations, plaintiff stated that Ludington told him, one week following his effective termination date, that if any position opened, he would be the first person called. Plaintiff then argues in *Sherman I* that available positions were filled by individuals much younger than he. Now, in *Sherman II*, plaintiff asserts fraudulent misrepresentation, based on the exact same conversation.

Appendix A

Appellant admits, in his brief opposing summary judgment in *Sherman II*, that his brief opposing summary judgment in *Sherman I* twice refers to the Sherman-Ludington conversation. This Court found at least four occasions where appellant specifically referred to the Sherman-Ludington conversation as evidence of misrepresentations.[4] Appellant responds by insisting that these references were made solely as evidence of his claim for discriminatory discharge.

It is obvious that appellant viewed this particular conversation to be a significant aspect of the facts and evidence necessary to prove the claims alleged in *Sherman I*. It is irrelevant to this Court that appellant intended to use the conversation only as evidence of a discriminatory discharge in *Sherman I*, and not to show intentional and/or negligent misrepresentation. What is relevant, for purposes of federal res judicata, is that the facts and evidence which make up part of appellant's claims in *Sherman I* are the exact same facts and evidence that are necessary to prove his claims in *Sherman II*. The principle of federal res judicata is only concerned with whether the claims arise from the same operative facts, not with a particular party's intention regarding their use. Based on the pleadings and plaintiff's admitted reliance, this Court can only conclude that the operative facts and evidence which form the basis for the *Sherman II* claims, are an integral part of *Sherman I*.

Second, the events relevant to both suits all took place around the same time and constitute the same transaction. Sherman was discharged on January 6, 1989. The conversation between Sherman and Ludington took place on January 13, 1989. The lower court explained:

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4. Pages 11, 19, 29, and 33 of Plaintiff's Brief in Opposition to Summary Judgment in *Sherman I*. (Jt. App. pp. 114, 122, 132, and 136).

Appendix A

> The fact that Sherman was allegedly terminated one day and then promised first chance at a new position several days later does not lead to the conclusion that his claims arose at different times.

(Joint Appendix, at 310-311). Appellant's termination, the telephone conversation one week later and the subsequent hiring of younger individuals all involve the same transaction.

Finally, both suits seek compensation for the same basic injury, i.e., plaintiff's initial discharge and continued loss of employment. The plaintiff, in *Sherman I*, included all evidence that surrounded his discharge, including the after-discharge statement by Ludington, in asserting his claims for breach of promise and negligent contractual performance. He is now prohibited, in *Sherman II*, from asserting that the conversation was an entirely different wrong giving rise to a separate and distinct cause of action.

There is every indication from the record that *Sherman II* was the same cause of action as *Sherman I*, as defined under *Kale*. Furthermore, the facts and evidence appellant expected to prove the claims in *Sherman II* can be found in *Sherman I*. That being the case, all three criteria for application of federal res judicata have been met.

B.

Appellant maintains that even if the Court finds that *Sherman I* and *Sherman II* constitute the same cause of action, the Court should not apply the federal rules of res judicata because the facts and evidence that give rise to the claims in *Sherman II* were not available until shortly before *Sherman I* was decided, on October 22, 1990. Appellant insists that the facts necessary to prove the elements of intentional and/or negligent misrepresentation did not

come to his attention until the September 4-6, 1990 depositions. Specifically, appellant argues that it was not until these depositions that he became aware that positions had been filled by others and that Sherman had not been given 'the first call,' as Ludington had promised in the January, 1989, telephone conversation. Appellant maintains that because it was not until September, 1990, that he became aware of the necessary injury to assert a claim for intentional and/or negligent misrepresentation, and because the *Sherman I* Court prohibited him from amending his complaint at that late date, he has not had a full and fair opportunity to litigate these claims.

The federal rule of res judicata takes into account such a circumstance. Succinctly put,

> final judgment by a court of competent jurisdiction bars a subsequent suit between the same parties and on the same cause of action not only as to all matters that were litigated in the first proceeding but also as to all issues that could have been litigated. (citations omitted).

Interstate Pipe Maintenance Inc. v. FMC Corp., 775 F.2d 1495, 1497 (11th Cir. 1985); *see, Johnson v. United States*, 576 F.2d 606, 611 (5th Cir. 1978), *Kale*, 924 F.2d at 1164.

Appellant unsuccessfully attempted to amend his complaint to include the negligent and/or intentional misrepresentation claims seventeen, then eleven days before trial in *Sherman I*. The district court in *Sherman I* expressly held that the information necessary to proceed on these claims was known to plaintiff at the time of the original complaint and denied the motion to amend prior to granting Chase Packaging Corp. summary judgment. *Sherman v. Chase Packaging Corp.*, No. 89-CV-1230, slip op. (N.D. Ohio, Oct. 22, 1990) (Jt. App. pp. 154-155). Plaintiff appealed that decision and

this Court upheld the lower court. *Sherman v. Chase Packaging Corp.*, No. 90-4033, Slip Op. (6th Cir. May 21, 1991). In its opinion, this Court specifically stated:

> [I]n Answers to Plaintiff's First Set of Interrogatories and Request for Production of Documents served on February 7, 1989, defendant provided documents including a list of all salaried employees with their dates of birth and dates of hire, a list of all office managers from 1985 through 1989, and a "List of Salaried Hires January, 1988 to Date," including a job description and date of hire. Identified as office managers in these documents are J. Drake and R. Ludington. *Thus. it is not true as plaintiff alleges that 'plaintiff and counsel were unaware [prior to the September 4-6, 1990 depositions] . . . that jobs had, in fact, become available and those jobs were offered and filled by younger persons (i.e. J. Drake and R. Ludington).'* Because plaintiff unduly delayed making this claim and because granting the motion would cause prejudice to defendant (who had no notice), it was not an abuse of discretion for the district court to deny the motion. (citations omitted) (emphasis added).

(Jt. App. p. 179).[5] This Court previously ruled on the issue of whether plaintiff could have brought the amended claims earlier. This Court concluded that plaintiff was aware of the subsequent

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5. This Court made a crucial typographical error in its opinion. The answers to Plaintiff's First Set of Interrogatories and Request for Production of Documents was served on plaintiff on February 7, 1990, not 1989.

hirings for over six months prior to the September, 1990 depositions. Specifically stated above, this Court determined that the information regarding the hiring of younger individuals came to the attention of appellant from defendants' February, 1990 Answers to Plaintiff's Request for Interrogatories and Production of Documents. For these same reasons, this Court again finds that for over six months prior to his attempting to amend his complaint, appellant was in possession of the facts and evidence that give rise to the claims asserted in *Sherman II*.

Even though plaintiff's claims for intentional and/or negligent misrepresentation were never addressed on their respective merits, because plaintiff possessed the facts and evidence and had the opportunity to litigate the claims at an earlier date, the doctrine of federal res judicata will be applied.

V.

For the above reasons, this Court affirms the lower court's decision granting defendants' motion for summary judgment. However, the Court bases its decision on application of the federal rule of res judicata and not Ohio law.

[stamped]
A TRUE COPY.
Attest:
LEONARD GREEN, Clerk
By s/ Valeine Fields
Deputy Clerk

ISSUED AS MANDATE: July 29, 1992
COSTS: (Awarded to appellee)

FILING FEE:	$None
PRINTING:	$132.80
TOTAL:	$132.80

APPENDIX B - PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 21, 1991

No. 90-4033

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY E. SHERMAN,

Plaintiff-Appellant,

vs.

CHASE PACKAGING CORP.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Before: JONES and SUHRHEINRICH, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Plaintiff-appellant, Roy E. Sherman, appeals the district court's grant of summary judgment to defendant-appellee, Chase Packaging Corp., on plaintiff's age discrimination, ERISA, and pendent state law claims. For the following reasons, we affirm the judgment of the district court.

I.

Plaintiff was employed by Chase Packaging Corporation ("Chase" or "defendant") from 1960 to 1971 and from 1973 to

1989. Plaintiff had been transferred several times at defendant's request to various Chase facilities. The claims in this case arise out of defendant's discharge of plaintiff on or about January 5, 1989 Defendant is involved in the business of manufacturing flexible packaging materials, and has a number of manufacturing facilities around the United States. One of the facilities owned by Chase, the Chagrin Falls, Ohio, plant, was sold to Ivex of Ohio, Inc. ("Ivex") in early January 1989. Chase retained no interest in the plant. The sale of the plant had been contemplated by Chase at least as far back as 1986, and negotiations between Chase and Ivex began in 1988.

Ivex did not tell Chase which employees at the plant would be retained until about January 4, 1989, two days before the sale took place. Chase was informed on January 4 that Ivex would not be hiring eight employees at the plant, including plaintiff. Chase discharged all those persons; plaintiff was discharged on or about January 5, 1989. Shortly thereafter, he was granted severance pay by the defendant.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on April 12, 1989. Subsequently, plaintiff brought this lawsuit containing several claims: age discrimination in violation of 29 U.S.C. §§ 621-634; violation of ERISA, 29 U.S.C. § 1140; age discrimination under the Ohio statute, Ohio Rev. Code § 4101.17; common law state claims for breach of contract, wrongful discharge and promissory estoppel; and negligent performance of contractual obligations.

Defendant filed a motion for summary judgment on September 11, 1990. Seventeen days prior to trial, plaintiff filed a motion for leave to amend the complaint, and on October 4, 1990, filed a second amended complaint alleging newly discovered evidence for a state law claim of intentional and negligent misrepresentation.

Appendix B

The district court denied plaintiff's motion to amend and granted defendant's motion for summary judgment. Plaintiff timely filed this appeal.

II.

Plaintiff argues that the district court abused its discretion in denying plaintiff's motion to amend his complaint.

The determination of whether a motion to amend will be granted is left to the sound discretion of the trial court. *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Estes v. Kentucky Utilities Co.*, 636 F.2d 1131, 1133 (6th Cir. 1980). Case law establishes that a motion to amend on the eve of trial after discovery has been closed is properly denied absent the discovery of new facts. *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987) (amendments near time of trial are disruptive and therefore subject to special scrutiny), *cert. denied*, 485 U.S. 977 (1988); *First National Bank of Louisville v. Master Auto Service Corp.*, 693 F.2d 308, 314 (4th Cir. 1982) (motion to amend properly denied when made nineteen days before trial and where amendment was not the result of movant's discovery of new facts). Thus, plaintiff's motion made initially seventeen and then eleven days prior to trial was properly denied absent discovery of new facts.

In his Motion for Leave to File his Second Amended Complaint, plaintiff sought to add state law claims for intentional and negligent misrepresentation. Accompanying the motion was a January 13, 1989 transcription of a purported taped telephone conversation, which occurred *five months prior* to the filing of the original complaint. The district court concluded that the facts which formed the basis of plaintiff's "new claims" were known to him from the time the original complaint was filed and should have been apparent from the outset. We agree.

Appendix B

Additionally, in Answers to Plaintiff's First Set of Interrogatories and Request for Production of Documents served on February 7, 1989, defendant provided documents including a list of all salaried employees with their dates of birth and dates of hire, a list of all office managers from 1985 through 1989, and a "List of Salaried Hires January, 1988 to Date," including a job description and date of hire. Identified as office managers in these documents are J. Drake and R. Ludington. Thus, it is not true as plaintiff alleges that "plaintiff and counsel were unaware [prior to the September 4-6, 1990 depositions] . . . that jobs had, in fact, become available and those jobs were offered and filled by younger persons (i.e., J. Drake and R. Ludington)." Because plaintiff unduly delayed making this claim and because granting the motion would cause prejudice to defendant (who had no notice), it was not an abuse of discretion for the district court to deny the motion. *Isaac v. Harvard University*, 769 F.2d 817, 829 (1st Cir. 1985); *Merchantile Trust Co. Nat. Ass'n v. Inland Marine Products Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976).

III.

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) states, "It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." The plaintiff employee bears the burden of proving a prima facie case of discrimination as well as rebutting any legitimate explanation for the discharge offered by the employer.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the

> plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53, (1981) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

In the present case, the district court concluded that the plant where plaintiff worked was sold to another corporation, which chose not to hire plaintiff, and therefore the discharge involved an employer's reduction in force (RIF). In a RIF discharge, a plaintiff must present additional direct, circumstantial, or statistical evidence tending to indicate that the defendant singled him out for discharge for impermissible reasons. *Barnes v. Gen. Corp. Inc.*, 896 F.2d 1457, 1469 (6th Cir.), *cert. denied*, 111 S. Ct. 211 (1990). Plaintiff's evidence "must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age." *Id.* at 1466. It is insufficient for plaintiff merely to demonstrate that younger persons were retained in other jobs for which plaintiff was qualified to perform. *Id.* at 1465.

The district court concluded that in the present case, plaintiff failed to meet his burden of establishing a prima facie case of age discrimination in a reduction-in-force discharge. After a careful review of the record, we find no error in the district court's factual

findings or conclusions of law in regard to this claim. We therefore affirm the district court on this issue.

IV.

We must next decide whether the district court erred in granting summary judgment on plaintiff's state age discrimination claim.

Plaintiff contends that his discharge also violated Ohio Rev. Code § 4101.17, Ohio's statutory prohibition against age discrimination. Both parties agree that disposition of the ADEA claim is controlling with respect to the state claim because the Ohio Supreme Court held in *Barker v. Scovill. Inc.*, 6 Ohio St. 3d 146 (1983) that federal law is to be followed in state age discrimination claims because the essential elements and burden of proof under the federal and state law are identical. Plaintiff's failure to establish a prima facie federal case thus defeats his state law claim as well.

V.

Plaintiff also argues that the district court erred in granting summary judgment on plaintiff's ERISA claim.

Plaintiff alleges that his discharge entailed a substantial savings for defendant because he had a vested pension plan at Chase and benefits under the plan are a function of an employee's salary and years of service.

This allegation fails to state a violation of ERISA, 29 U.S.C. § 1140. To be successful on an ERISA claim, a party must prove that the employer made the decision to discharge him with the specific intent to violate ERISA. *Gavalik v. Continental Can Co.*,

812 F.2d 834, 851 (3rd Cir. 1987); *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988).

> Plaintiff must establish more than the mere fact that termination of his employment meant a monetary savings to defendants, 'for to allow otherwise would mean that an ERISA violation would automatically occur every time an employer terminated a vested employee.' The 'something more' which must be shown is a casual link between pension benefits and the adverse employment decision. In order to survive defendants' motion for summary judgment, plaintiff must come forward with evidence from which a reasonable jury could find that defendants' desire to avoid pension liability was a determining factor in plaintiff's discharge.

Nixon v. Celotex Corp., 693 F. Supp. 547, 555 (W.D. Mich. 1988) (citation omitted).

Thus, in the present case, it was incumbent upon plaintiff to demonstrate that Chase's specific intent, purpose and motivating factor behind his discharge was to deprive him of benefits or rights conferred under ERISA. Plaintiff cannot demonstrate this where, as here, a discharge occurred through a bona fide sale of the facility where he worked and there was a corresponding reduction in the work force. The only evidence plaintiff offers that the employer specifically intended to violate ERISA is his lost opportunity to accrue additional benefits. Such a claim does not provide sufficient evidence to separate that alleged intent from the legitimate reason Chase had for discharging him. *Corum v. Farm Credit Services*, 628 F. Supp. 707, 718 (D. Minn. 1986). For these reasons, the grant of summary judgment on the ERISA claim was correct.

Appendix B

VI.

We must finally decide whether the district court erred in dismissing plaintiff's pendent state law claims.

The parties agree that under Ohio law, the general rule is that an employment agreement purporting to be permanent, for life, or for no fixed time period is considered to be employment terminable at the will of either party. *Henkel v. Educational Research Council of America*, 45 Ohio St. 2d 249 (1976). Plaintiff argues that the present case falls within the exception articulated in *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985), in which the court stated that "a for just cause" employment contract could be created by the "character of the employment, custom, the course of dealing between the parties, or other fact which may throw light upon the question." *Id.* at 104. Plaintiff argues that he has presented evidence indicating that Chase has a written "just cause policy." Plaintiff presented his own testimony, the affidavit of Charles Wicks, a company newsletter relating to termination of salaried employees, and a termination of employment card in support of this contention.

We believe that defendant has persuasively argued that these items do not constitute a written policy for just cause. What is dispositive of this issue is that Chase's written termination policy, contrary to plaintiff's contention, does not limit terminations to ones for just cause. Specifically, the policy states:

> Any employee who resigns or is discharged for cause is not eligible for any termination pay. Employees who are terminated by the company will receive pay for the vacation allowance as outlined in policy bulletin no. 9. In addition, depending on the circumstances

> that led to the termination as well as the length of service of the individual, the company will grant termination pay with consideration being given to recommendations made by the individual's immediate supervisor. Any termination pay which may be granted will be determined by the personnel committee.

If Chase's policy were limited to discharging employees only for "just cause," there would be no provision conferring termination pay benefits on certain employees and excluding it from those who resign or are discharged for cause. Moreover, the fact that as a result of changes in the economy, product lines, and technical advances, numerous plant closings have occurred at Chase over the last twenty years that in many instances resulted in *all employees* of those facilities being discharged indicates that no policy requiring retention of these employees existed.

For these reasons, the grant of summary judgment to defendant on this issue was correct.

VII.

Plaintiff also argues that the district court erred in granting defendant's motion for summary judgment on plaintiff's claim of promissory estoppel.

Plaintiff argues that under Ohio law, an employer's right to discharge is limited where representations have been made to the employee which fall within the doctrine of promissory estoppel. As held in *Mers:*

> We therefore hold that where appropriate, the doctrine of promissory estoppel is applicable

> and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise.

19 Ohio St. 3d at 105. Plaintiff argues that on numerous occasions, Chase representatives promised him, "You'll never get rich working at Chase, but you'll always have a job."

In the present case, plaintiff had not set forth evidence which would have led him to believe he would remain employed regardless of defendant's financial status. Defendant Chase concedes that it told plaintiff that it believed plaintiff would be kept on by Ivex after the sale of the plant and that it was only at the last minute that Ivex revealed its intention to dismiss eight of the Chagrin Falls plant employees. Defendant argues that plaintiff's assumption that he would be transferred if the plant were sold was not based on a specific promlse made by Chase to that effect, but on his subjective belief. The record reveals the following exchange:

> Q. What gives you the belief that you had a right to be transferred to another Chase facility when this sale occurred?
>
> A. I have been a loyal employee. I have been in six different locations. I felt very secure with Chase until my retirement. It has been, you were always let go for just cause. That's the way I came up. That's the way I administered all my discipline. I have been on both sides of the table. When I have had to let people go it

> was for just cause. I felt very secure in my job. I was happy at my job. I thought that I would be transferred, not just let go. Here's another thing. I'm 56 years old. And this might be a little lengthy answer, but here's why I felt secure.
>
> Q. Just make sure you know what you're answering, why you believe that you had a right to be transferred, correct?
>
> A. By past experiences, by the sheer fact that I've been transferred five or six times, there was, the Assistant Manager's position was a position created here in Chagrin Falls. They haven't had one in the last few years. That was created for me to bring me in here. *And I just figured that a position would be made or there was one available for me at all times because I was a loyal employee to the company.* I had been in six locations. Why would I ever think that I wouldn't have a job? (Emphasis added.)

"[S]ubjective expectation[s] of permanent employment cannot create a contract in accordance with [a plaintiff's] understanding," *Corum*, 628 F. Supp. at 714-15, nor is it sufficient to make out a claim of promissory estoppel. *Id.* at 716. Although plaintiff testified that Paul Lux, the corporate attorney, told him his job was secure in relation to the Ivex sale, on cross examination, plaintiff stated that Mr. Lux also told him that Ivex was going to hold employees for 30 days. There is no indication that Chase promised anyone that they would be retained after the plant was sold even if the buyer did not want them and there were no jobs available at Chase for such employees to be transferred into. Thus, plaintiff cannot prove that

his conditions of employment included remaining at Chase despite the elimination of his position. Moreover, it was not reasonable to rely on Lux's statement for the proposition that he had job security with *Chase*, when it was clear that Mr. Lux was indicating that he was confident that plaintiff would be hired by *Ivex*. The evidence presented by defendant indicates that when other plants were closed, sometimes employees were terminated and, at other times, employees were transferred, depending upon the availability of positions at other facilities. Plaintiff did not inquire about what would happen if Ivex did not want him or whether a position would then be available for him at another plant. Failure to do so defeats his claim of promissory estoppel. The district court is therefore affirmed on this issue.

VIII.

To conclude, we AFFIRM the decision of the district court to grant Chase Packaging Corporation's motion for summary judgment.

[stamped]
A TRUE COPY.
Attest:
LEONARD GREEN, Clerk
By s/ Valeine Fields
Deputy Clerk

ISSUED AS MANDATE: June 12, 1991
COSTS: (Awarded to appellee)

FILING FEE	None
PRINTING	$148.40
TOTAL	$148.40

APPENDIX C — MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED OCTOBER 22, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C89-1230

JUDGE ALICE M. BATCHELDER

ROY E. SHERMAN

Plaintiff

v.

CHASE PACKAGING CORP.

Defendant

ORDER

This case having come before the Court on plaintiff's motions for leave to file an amended complaint and a second amended complaint, and defendant's motion for summary judgment, and a Memorandum of Opinion having been issued in this case, plaintiff's motions to amend are hereby DENIED, and defendant's motion for summary judgment is GRANTED.

s/ Alice M. Batchelder
ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. C89-1230

JUDGE ALICE M. BATCHELDER

ROY E. SHERNAN

Plaintiff

v.

CHASE PACKAGING CORP.

Defendant

MEMORANDUM OF OPINION

This matter is before the Court on three motions: defendant's motion for summary judgment and plaintiff's motions for leave to file an amended complaint and a second amended complaint. In his motions to amend, filed only seventeen and eleven days prior to the scheduled trial date, plaintiff seeks to make substantive changes to his claims. In the motion for leave to file an amended complaint, plaintiff seeks to change the basis for his breach of contract and wrongful discharge claims by adding that defendant failed to lay him off and/or recall him. In his motion for leave to file a second amended complaint, plaintiff seeks to add state law claims for

intentional and negligent misrepresentation. Such motions on the eve of trial are not well-taken, especially when it is obvious that the party asserting the new claim has had the facts which form the basis of the new claim throughout the litigation. This is clearly the case here. The misrepresentation claims, which are based on the transcript of a January 1989 phone conversation, either were or should have been apparent to plaintiff's counsel at the outset of this case. Therefore, the motions to amend will be denied.

The balance of this opinion addresses the defendant's motion for summary judgment. In ruling upon this motion, the Court has carefully considered the materials submitted by both parties including defendant's motion, amended brief in support, and reply brief; plaintiff's brief in opposition, supplemental brief, and surreply brief; and all the exhibits and deposition transcripts on file with the Court.

FACTS

Plaintiff, Roy Sherman, was employed by Chase Packaging Corporation ("Chase" or "defendant"), from 1960 to 1971 and from 1973 to 1989. Plaintiff had been transferred several times at defendant's request to various Chase facilities. Plaintiff claims that both at the time he was first hired by Chase and during his tenure with Chase, plaintiff was told several times, "You'll never get rich working at Chase, but you'll always have a job."

The claims in this case arise out of defendant's discharge of plaintiff on or about January 5, 1989. The undisputed facts of the case are as follows. Defendant is involved in the business of manufacturing flexible packaging materials. It has a number of manufacturing facilities around the United States. One of the facilities that Chase owned, the Chagrin Falls, Ohio, plant (the

"plant"), was sold to Ivex of Ohio, Inc. ("Ivex") in early January 1989. Chase retained no interest in the plant. The sale of the plant had been contemplated by Chase at least as far back as 1986, and negotiations between Chase and Ivex began in 1988.

Ivex did not tell Chase which employees at the plant would be retained until about January 4, 1989, two days before the sale took place. Chase was informed on January 4 that Ivex would not be hiring eight employees at the plant, including plaintiff. Chase discharged all those persons; plaintiff was discharged on or about January 5, 1989. Shortly thereafter, he was granted severance pay by the defendant.

Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on April 12, 1989. Subsequently, plaintiff brought this lawsuit containing several claims: age discrimination under the federal statute, 29 U.S.C. §§621-634; violation of ERISA, 29 U.S.C. §1140; age discrimination under the Ohio statute, Ohio Rev. Code §4101.17; common law claims for breach of contract and wrongful discharge; and negligent performance of contractual obligations.

STANDARDS FOR RULING ON A SUMMARY JUDGMENT MOTION

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

> that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The moving party, however, is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing the motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party when deciding whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). In determining whether a factual issue is "genuine" the Court must decide whether the evidence is such that reasonable jurors could find that the [non-moving party] is entitled to a verdict. *Id.* at 251-52. The existence of a mere scintilla of evidence in support of the nonmoving party's position ordinarily will not be sufficient to defeat a motion for summary judgment. *Id.* at 252. With these standards in mind, the Court will address the defendant's motion for summary judgment with respect to each claim.

A. Claim Under the Age Discrimination in Employment Act

If this case is truly one involving an employer's work force reduction, or reduction-in-force ("RIF"), the elements of plaintiff's prima facie case will be different from those in a non RIF discharge case. *Barnes v. GenCorp Inc.*, 896 F.2d 1457 (6th Cir.), *cert. denied*,___ S. Ct.___, 1990 WL 116233 (Oct. 1, 1990). Therefore,

the threshold issue is whether this case can fairly be characterized as one involving a work force reduction. The Sixth Circuit has addressed this issue very recently:

> A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties.

Barnes, 896 F.2d at 1465. Based on the undisputed facts, this case is clearly one involving a work force reduction. The plant where plaintiff worked was sold to another corporation, which chose not to hire plaintiff. With the plant no longer part of defendant's organization, clearly the position that plaintiff held was eliminated. Indeed, with respect to the defendant, once the plant was sold all of the positions at the plant were eliminated.

In this case plaintiff has demonstrated that he was a member of the protected class, that he was qualified to perform the job that he held, and that he was discharged. Without more, however, those facts do not establish a prima facie case in a RIF situation, because in such cases the "most common legitimate reasons for the discharge are the work force reductions." *Barnes*, 896 F.2d at 1464-65. Therefore, in order to establish a prima facie case, plaintiff must present additional direct, circumstantial, or statistical evidence

tending to indicate that the defendant singled him out for discharge for impermissible reasons. *Id.* at 1465; *LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1090 (6th Cir. 1984). Plaintiff's evidence "must be sufficiently probative to allow a factfinder to believe that the employer intentionally discriminated against the plaintiff because of age." *Barnes*, 896 F.2d at 1466. It is insufficient for plaintiff merely to demonstrate that younger persons were retained in other jobs for which plaintiff was qualified to perform. *Id.* at 1465.

The next level of inquiry involves evaluating the evidence that plaintiff has adduced which would tend to show that he was discriminated against by defendant. Essentially, this evidence falls into five categories. First, when there were other plant closings some of the managers were transferred, but when the Chagrin Falls plant was sold plaintiff was not transferred. Second, defendant transferred some other persons from the Chagrin Falls facility but did not transfer plaintiff. Third, seven of the eight persons who worked at the sold plant and were discharged were over age forty. Fourth, defendant has changed its explanation of why it discharged plaintiff. Fifth, after plaintiff's discharge, defendant's president, William Ludington, promised to offer managerial positions to plaintiff as they became available, but plaintiff received no such offer and two such jobs were filled with younger persons. Each category will be addressed.

1. Failure to Transfer Plaintiff

Plaintiff makes three arguments with respect to defendant's failure to transfer plaintiff to another Chase facility: (1) that the failure to transfer is evidence of age discrimination; (2) that defendant had a policy of transferring salaried employees, and defendant's failure to do so in his case is evidence of age discrimination; and (3) that defendant's failure to transfer him during the period from 1986 to 1989, when Chase was seeking a

buyer for the plant, is evidence of age discrimination.

a. The failure to transfer plaintiff at the time of the sale of the Chagrin Falls plant

As the Sixth Circuit has made clear, "an employer has no duty under ADEA to permit an employee to transfer to another position . . . when the employee's position is eliminated as part of a work force reduction." *Barnes v. GenCorp Inc*, 896 F.2d 1457, 1469 (6th Cir. 1990); *accord Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986). In this case, since plaintiff's position was eliminated as a result of a work force reduction, he was not entitled to a transfer. Therefore, the deposition testimony indicating that when some other managerial positions were eliminated, the persons holding those jobs—who were younger than plaintiff — were retained by the defendant, does not provide the necessary direct, circumstantial, or statistical evidence tending to indicate that the defendant singled him out for discharge for impermissible reasons. *Barnes*, 896 F.2d at 1465.[1]

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1 Had plaintiff been able to present statistical evidence about defendant's rates of transferring personnel versus terminating personnel whose positions have been eliminated, such statistics might have been sufficient to raise an inference of discrimination. As it is, however, the plaintiff simply sets forth the names and ages of some persons younger than plaintiff who were retained by defendant after their positions were eliminated. There is no indication, however, that older persons were treated any differently from younger persons. *See e.g., Abbott v. Federal Forge, Inc.*, ___ F.2d, ___ slip op. at 6 (6th Cir.) (Aug. 30, 1990) (plaintiff may show disparate impact of an employment policy by demonstratinq that the policy is neutral on its face but has the effect of disproportionately impacting on members of the protected group).

b. Defendant's failure to follow its policy of transferring salaried employees

Plaintiff's contention that the defendant maintained a policy of transferring managerial employees also fails. First, plaintiff presents the affidavit of Charles Wicks who states that plaintiff reasonably could have expected to be transferred at the time the plant was sold. (Wicks Affidavit ¶4, Exhibit D to Plaintiff's Brief in Opposition to Summary Judgment). Wicks also states that he could not think of anyone in a position comparable to plaintiff's who was not given an opportunity to stay with the company when a plant closed. (*Id.*) Such conclusory statements are insufficient to defeat a summary judgment motion. *Galindo v. Precision American Corp.*, 754 F.2d 1212 (5th Cir. 1985). In addition, although Wicks states that he is familiar with the personnel policies of Chase (*id.*, ¶1), his affidavit provides no facts demonstrating that he has such knowledge. Indeed, in his recently filed evidentiary deposition Wicks stated that he left Chase seventeen years ago. (Deposition of Charles Wicks at 13.) "Affidavits must be based on personal knowledge, setting forth facts admissible in evidence." *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 295 (5th Cir. 1987) (citing Fed. R. Civ. P. 56(e)).

In addition, plaintiff presents a Chase labor relations newsletter relating to just cause termination and a termination of employment card as evidence that defendant had a policy of transferring its employees. Although these documents may be relevant to the existence of an implied-in-fact contract, they are irrelevant with respect to the existence of a Chase policy of transferring employees.

In contrast, defendant's witnesses testified that there was no policy of transferring managerial employees. (Deposition of

William Ludington at 91; deposition of Francis Ludington at 26-29). Plaintiff's evidence fails to demonstrate the existence of a clear policy of transferring employees. *See Barnes*, 896 F.2d at 1470 (plaintiffs failed to demonstrate existence of policy of senior employees bumping junior ones). Absent such a policy, defendant's failure to transfer plaintiff does not constitute circumstantial evidence tending to indicate that the defendant singled him out for discharge for impermissible reasons, which is what plaintiff must present in order to establish a prima facie case. *Barnes*, 896 F.2d at 1465.

c. Failure to transfer plaintiff prior to the sale of the Chagrin Falls plant

In his complaint, plaintiff claims defendant discriminated against him by denying him the opportunity to transfer to another of its facilities. (Complaint ¶6.) As the Court understands plaintiff's argument, plaintiff appears to claim that Chase had some obligation to find a job for plaintiff elsewhere in its organization (leaving plaintiff's position vacant) — despite the fact that plaintiff had not applied for a transfer—simply because Chase was looking for a buyer for the Chagrin Falls plant. The Court is at a loss to find evidence in the record that defendant's failure to do so is at all related to plaintiff's age. Plaintiff's own deposition indicates that he never requested a transfer during the period from 1986 until his termination (Deposition of Roy Sherman at 50), despite the fact that he was worried about what might happen if the plant closed. (*Id.* at 51.) In addition, the Court cannot conceive of any legal basis for plaintiff's argument that defendant had any such obligation.

In summary, plaintiff's evidence that defendant failed to transfer him to another location does not establish a prima facie case of discriminatory discharge. Plaintiff's argument that he was

qualified to hold other positions in defendant's organization is meaningless unless such positions were available at the time plaintiff was discharged. Plaintiff has presented no evidence that such positions were available.

2. The Transfer of Other Employees

Plaintiff seeks to establish an inference of discrimination by pointing to Chase's transfer of three of its employees in its technical department from the Chagrin Falls' facility to another facility about two months prior to the closing of the Chagrin Falls plant. Plaintiff is correct that the preferential treatment of younger employees can give rise to an inference of discrimination. *See e.g., LaGrant v. Gulf & Western Mfg. Co.*, 748 F.2d 1087, 1091 (6th Cir. 1984). In this case, however, no inference of discrimination arises, since the younger employees (ages 39, 43, and 45) held jobs unrelated to the type of work that plaintiff did. If, as in *Barnes*, evidence which merely demonstrates that younger persons were retained in other jobs which plaintiff was qualified to perform is insufficient to raise an inference of discrimination, then certainly evidence which demonstrates only that younger persons were retained in jobs for which plaintiff was not qualified is insufficient to raise such an inference. *See* 896 F.2d at 1466.

3. The Employees Discharged from the Chagrin Falls Plant Were Almost All Over Age Forty

All the employees whom Ivex did not want to hire upon its purchase of the Chagrin Falls plant were discharged by defendant. The ages of these persons were 63, 57, 56, 52, 50, 46, 44, and 35. However, unless plaintiff has evidence (and none was presented) that the sale of the plant was somehow motivated by Chase's desire to get rid of some of its older employees, the discharge of those

persons — in the absence of some showing that defendant had positions *available* for which they were qualified but which it filled with younger persons — cannot support an inference of age discrimination. *See Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985) (no prima facie case of age discrimination when after plaintiffs' positions were eliminated there were no jobs available at the time of plaintiffs' discharge; mere probability that some position would come into existence in the future is insufficient).

4. Defendant's Changed Explanation For Plaintiff's Discharge

There is authority for the proposition that when an employer changes its explanation for having taken negative employment action against an employee, that behavior can "generate serious adverse inferences as to the pretextual nature of its explanations." *Norris v. City and County of San Francisco*, 900 F.2d 1326, 1331 (9th Cir. 1990). There is no authority for the proposition that a changed explanation would provide circumstantial evidence of age discrimination. Even if a changed explanation provided such circumstantial evidence, however, it would not help the plaintiff in this case since there has been no such change in Chase's explanation. Plaintiff contends that defendant has changed its explanation for having discharged plaintiff and presents the defendant's letter to the EEOC as support. (*See* Plaintiff's Brief in Opposition to Summary Judgment, Exhibit J). Plaintiff points to the part of the letter that stated, "Chase will dispute any allegations that Mr. Sherman was qualified to perform the office manager function at any other plant location." (*Id.* at 1).

That single passage, however, does not fully and accurately present defendant's explanation to the EEOC. Defendant's letter explicitly states that the Chagrin Falls plant was sold. (*Id.*) Ivex, the

purchaser, did not tell defendant which of defendant's employees it would or would not hire. (*Id.*). Ivex did not disclose to defendant until two days before the sale that it was not going to hire plaintiff and several others. (*Id.*). Thus, defendant had little time to make a decision on plaintiff's employment situation.[2]

It is perfectly clear from the letter that plaintiff was discharged, among other things, because the position that he had held with the company no longer existed. That defendant also claims that a work force reduction had been going on over a longer period of time is not evidence that defendant has changed its explanation for its termination of plaintiff. Therefore, despite plaintiff's contention on this issue, defendant's explanation for discharging plaintiff provides no direct or circumstantial evidence of discrimination against plaintiff.

5. The Hiring of Younger Office Managers Later in 1989

Plaintiff alleges that in a January 1989 phone conversation he was told by defendant's president, William Ludington, that when a position opened up with the company, plaintiff would be the first one called about it.[3] Plaintiff claims that two office manager positions—one in Sibley, Iowa, and one in Los Angeles — opened

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2 In the letter defendant also noted, "Because there were no Office Manager jobs open at any location, he was advised that he would be eligible for a severance package as a result of the sale of the mill." (*Id.* at 2). Defendant's letter also referenced an attached affidavit by Leonard Schmitz, Vice President of Manufacturing, in which Mr. Schmitz stated "there were no jobs available in the Chase organization that he [Mr. Sherman] was qualified to perform." (*Id.*, Attachment 1).

3 When asked in his deposition about his conversations with Mr. Sherman, William Ludington testified that he could not remember whether he had made any comment to Sherman about future job openings. (William Ludington Deposition at 83-85.)

later in 1989, were filled by persons younger than he, and that he was not offered those positions. (Plaintiff's Brief, Exhibit O.)

The pertinent question with respect to this evidence is whether it is relevant to prove discriminatory discharge. Clearly the fact that younger persons were hired at other locations four and seven months after plaintiff was discharged does not indicate age discrimination against plaintiff. On this point, the case of *Trembath v. St. Regis Paper Co.*, 753 F.2d 603 (7th Cir. 1985), is instructive. The jobs of the plaintiffs in *Trembath* were eliminated when defendant/employer lost a contract that had been the source of plaintiffs' work. Four months later, two positions opened up at the company and were filled by persons younger than plaintiff. The court noted, "it appears indubitably that when [plaintiffs] were terminated on December 31, 1980, there were no available jobs in existence." *Id.* at 605. The court concluded that the district court had properly granted summary judgment for the employer:

> [T]he District Court held that the mere probability that a suitable job will come into existence in the future does not suffice to satisfy the requirement that there be an existing job with respect to which age discrimination is practiced before there can be a violation of 29 U.S.C. 623(a). We affirm.

Id. at 604.

Plaintiff's reliance on Ludington's alleged breach of promise as evidence that his discharge was discriminatory is misplaced. Although such evidence might be probative of a failure to hire, a claim that plaintiff did not allege in his complaint, it does not demonstrate that age was a factor in plaintiff's discharge.

Even assuming some of this evidence is sufficient to establish a prima facie case, which the Court believes it is not, the elimination of plaintiff's position by virtue of the sale of the plant is undisputed. Thus, defendant has clearly articulated a non-discriminatory reason for plaintiff's discharge and plaintiff certainly has not adduced sufficient evidence of pretext that would require submission of this case to a jury.

B. ERISA Claim

To be successful on a claim under 29 U.S.C. §1140, plaintiff must prove that defendant made the decision to discharge him with the specific intent to violate ERISA. *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979 (1987); *Clark v. Resistoflex Co.*, 854 F.2d 762, 770 (5th Cir. 1988); *Garry v. TRW Inc.*, 603 F. Supp. 157, 162 (N.D. Ohio 1985). Plaintiff has presented no evidence to demonstrate such intent. On summary judgment, it is plaintiff's burden to do so, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 257 (1986), and failing to do so, summary judgment must be granted on the ERISA claim.

C. Ohio Age Discrimination Claim

Both parties agree that the disposition of the ADEA claim is controlling with respect to the Ohio age discrimination claim. *McLaurin v. Fischer*, 768 F.2d 98 (6th Cir. 1985); *Baker v Scovill Inc.*, 6 Ohio St.3d 146, 451 N.E.2d 807 (1983). Therefore, since the ADEA claim has been dismissed, the Ohio age discrimination claim will also be dismissed.

D. Claims for Wrongful Discharge and Breach of Contract

The general rule in Ohio is that unless otherwise agreed to by the parties, an employment agreement purporting to be permanent

or for life, or for no fixed time period is considered to be employment terminable at the will of either party. *Henkel v. Education Research Council*, 45 Ohio St.2d 249, 344 N.E.2d 118 (1976). But Ohio also recognizes exceptions to this rule. In particular, the Ohio Supreme Court has noted that

> the facts and circumstances surrounding an oral employment-at-will agreement, including the character of the employment, custom, the course of dealing between the parties, company policy, or any other fact which may illuminate the question, can be considered by the trier of fact in order to determine the agreement's explicit and implicit terms concerning discharge.

Mers v. Dispatch Printing Co., 19 Ohio St.3d 100, 483 N.E.2d 150, 154 (1985). Furthermore, the employer may be limited in its ability to discharge an employee when representations have been made to such employee that fall within the doctrine of promissory estoppel. *Id.*

In this case, plaintiff asserts a claim for wrongful discharge and breach of employment contract based on what he contends was an implied-in-fact contract providing that he could be discharged only for just cause. Plaintiff presents his own testimony, the affidavit of Charles Wicks, a company policy bulletin relating to termination of salaried employees, and a termination of employment card in support of this contention. For the purposes of this motion, even if plaintiff could prove such a claim, the Court finds it unnecessary to determine whether plaintiff's evidence could support a claim that he was terminable only for just cause, since as a matter of law the sale of the plant by defendant to a wholly separate and distinct

entity, which chose not to hire plaintiff, provides just cause for plaintiff's discharge.

In a case decided by the Sixth Circuit under Michigan law, the court determined that when an employer has eliminated an employee's position as part of a work force reduction the employee does not state a wrongful discharge claim. *Boynton v. TRW. Inc.*, 858 F.2d 1178, 1184 (6th Cir. 1988). The court noted that there is no support for a claim that a just cause employment agreement guarantees permanent employment regardless of changed economic circumstances, unless the agreement specifically so provides. *Id.* In addition, the court noted that the plaintiff had no right to have the jury determine the soundness of a management decision to reduce its work force. *Id.* Therefore, the court held that "to the extent [plaintiff's] claim challenges the 'justness' of [defendant's] economically motivated decision to eliminate his sales position, a position left unfilled, [defendant] is entitled to judgment as a matter of law." *Id.*

This Court is confident that Ohio, whose law regarding employment at will and just cause termination is similar to Michigan's, would adopt a similar approach. And in the absence of a statement by the Ohio Supreme Court that a legitimate RIF would not constitute just cause for the discharge of an employee whose position is eliminated, this Court is unwilling to so hold.

In the one Ohio case addressing this issue,[4] the Ohio Court of

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4 Plaintiff cites *Kelly v. Georgia-Pacific Corp.*, 46 Ohio St.3d 134, 545 N.E.2d 1244 (1989), in support of his position, indicating that Kelly had "virtually identical facts." (Plaintiff's Brief at 47). Kelly is clearly distinguishable from this case most particularly because that case did not involve a work force reduction, a consideration that is critical to the Court's resolution of the motion in this case.

Appendix C

Appeals rejected the plaintiff/appellant's argument that promissory estoppel limited his employer's right to terminate him during a work force reduction. *Hoops v. United Telephone Co. of Ohio*, 1988 WL 88773 (Ohio App. Wood County 1988) (not reported in N-E-2d), *aff'd on other grounds*, 50 Ohio St.3d 97, 553 N.E.2d 252 (1990). The court of appeals stated, "Appellant's job was eliminated, and he subsequently selected early retirement, pursuant to a reduction in appellee's work force. Appellant has not set forth evidence of any representations by appellee which could have led him to believe that he would remain employed regardless of appellee's financial status." *Id.*

In the present case, plaintiff claims that Chase's representations "were to the effect that notwithstanding any sale, Plaintiff's job with Chase was secure." (Plaintiff's Brief at 4.) In support of this contention, plaintiff cites several parts of the record. (*Id.*. n.10) First, plaintiff cites the deposition of William Ludington. (Deposition of William Ludington at 90-91, 95.) The portion plaintiff cites, however, does not support his contention; rather, Mr. Ludington's statements merely indicate that Chase anticipated that the employees at the Chagrin Falls plant would be retained by the buyer, Ivex. Second, plaintiff cites his own deposition testimony, (Deposition of Roy Sherman at 52-53), specifically a statement made by Chase's general counsel, Paul Lux ("Lux"). Plaintiff testified:

> At our Quarter Century party, don't ask me the date, I can't recall it, but it was prior to the sale, Paul Lux, the corporate attorney, came out there and told everybody, "Well, the sale is pending, we don't know what's going on, may not come about, but don't you folks worry, your jobs are secure," that's what we were told.

(*Id.* at 52.) Later in the deposition, the following exchange occurred between defendant's counsel and plaintiff:

Q. When did you hear this thing about Ivex was going to hold employees for 30 days?

A. Paul Lux told that at the Quarter Century Club.

Q. What else do you recall Mr. Lux telling you at the Quarter Century Club.

A. Right off the top, he said, "You don't have to worry about your jobs."

Q. Did he make any promises to you that Chase was going to keep everyone on, or did he tell you that Ivex was going to keep everyone on for 30 days and make a decision at that time?

A. I've already answered that question. I told you best that I can recall what Paul had said.

(*Id.* at 57-58.) From this discussion it is clear that Lux did not promise plaintiff that there would be a position for him at Chase regardless of what happened with the sale of the plant. Absent such statements, as a matter of law the sale of the plant provides just cause for plaintiff's discharge.

The third item plaintiff cites to support his contention that he was assured his position with Chase was secure is the affidavit of Betty Glover, who had also been discharged by Chase after the sale of the Chagrin Falls plant. (Plaintiff's Brief, Exhibit F.) Ms. Glover states, "Prior to the sale of Chase's Chagrin Falls, Ohio plant, I

along with the other Chase employees there were assured by Chase executives and management that our jobs were secure and that we would not lose our jobs as a result of any sale." (*Id.*, 4.) This statement, like plaintiff's statement, does not demonstrate the existence of a genuine issue of material fact regarding plaintiff's claim of wrongful discharge. There is no indication that Chase promised anyone that they would be retained after the plant was sold even if the buyer did not want them and there were no jobs available for such employees to be transferred into. Thus, plaintiff could not prove that his conditions of employment included remaining at Chase despite the elimination of his position.

The one federal district court case from Ohio that addressed this issue is distinguishable from the present case. In *Hawley v. Dresser Industries. Inc.*, 737 F. Supp. 445 (S.D. Ohio 1990), plaintiff had been terminated as part of the defendant's work force reduction. Plaintiff admitted that reduction in force would constitute "just cause" for the discharge, but the issue was whether the employer's motivation for the discharge was economic or discriminatory. *Id.* at 466. The court noted that defendant's Industrial Relations Manual and an internal memorandum specified procedures to be followed in the case of reductions in force. *Id.* at 467. The court then concluded:

> [T]he reduction itself cannot serve as "just cause" for summary dismissal in view of the discharge procedures. Accordingly, since the "just cause" rationale on which the defendants rely falls under special limitations in this case, a simple showing of a legitimate reduction in force is not enough to demonstrate that the defendants complied with all contractual duties. The plaintiff could assert a breach of the

> defendants' procedural duties, even granting that the reduction in force was legitimate.

Id. The clear implication of the court's statement is that if there had been no written policy regarding work force reductions, then summary judgment would have been appropriate upon defendants' demonstration of a legitimate work force reduction.

This latter situation is precisely the case before this Court. The defendant eliminated plaintiff's position pursuant to a legitimate work force reduction (i.e. the sale of the plant). Plaintiff has supplied no evidence that defendant had any type of policy whatever regarding work force reductions. In fact, the evidence presented relative to this motion indicates only that when other plants were closed by defendant sometimes the employees were terminated and other times employees were transferred, depending on the availability of positions at other facilities. *See supra* pp. 8-10. Therefore, this case is appropriate for summary judgment on the wrongful discharge and breach of contract claims.

E. Claim for Tortious Breach of Contractual Obligations

Plaintiff did not oppose the summary judgment motion on this claim and, in fact, has subsequently moved to amend his complaint to strike this count. Therefore, summary judgment is granted for defendant on Count V of plaintiff's complaint.

Appendix C

CONCLUSION

Based on the foregoing analysis, defendant's motion for summary judgment is granted and plaintiff's claims are dismissed. An appropriate Order will be issued.

IT IS SO ORDERED

Dated this 22nd day of October, 1990.

s/ Alice M. Batchelder
ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER FILED SEPTEMBER 18, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:91CV0673

ROY E. SHERMAN,

Plaintiff,

vs

WILLIAM F. LUDINGTON, et al.,

Defendants.

ORDER

ALDRICH, J.

The Court has filed its memorandum and order granting defendants' joint motion for summary judgment, and entering judgment in favor of the defendants; therefore,

IT IS ORDERED that defendants' joint motion for summary judgment is granted, judgment is entered in favor of the defendants, and the case is dismissed.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:91CV0673

ROY E. SHERMAN,

Plaintiff,

vs.

WILLIAM F. LUDINGTON, et al.,

Defendants.

ALDRICH, J.

MEMORANDUM AND ORDER

Roy Sherman seeks damages for alleged negligent and intentional misrepresentations made by William Ludington, Chase Packaging Corporation, Bag Merger Corporation, and Union Camp Corporation. The defendants have moved for summary judgment, pursuant to Federal Rule of Civil Procedure 56, on the grounds that no genuine issue of material fact exists, and that Sherman's complaint is barred by res judicata and collateral estoppel. For the reasons set forth below, defendants' motion for summary judgment is granted.

Appendix D

I.

Sherman has previously presented claims, in this district court, arising from the same facts as are at issue in this case. In *Sherman v. Chase Packaging Corp.*, No. 89-CV-1230, slip op. (N.D. Ohio, Oct. 22, 1990), *aff'd* No. 90-4033, slip op. (6th Cir. May 21, 1991), Sherman alleged that his termination from employment, by these same defendants, was a result of age discrimination, in violation of 29 U.S.C. §623, a denial of pension benefits in violation of 29 U.S.C. §1144 (sic); and three pendent state law violations. One of these pendent state claims was for "negligent performance of contractual obligations."

In the earlier case, Sherman filed a motion for leave to file a second amended complaint, seeking to withdraw the pendent state claim for negligent performance of contractuial obligations and to substitute a pendent state claim for negligent and intentional misrepresentation. This motion was filed approximately two weeks before the case was scheduled for trial.

Another judge of this district court denied Sherman leave to file the second amended complaint, holding that the misrepresentation claims "either were or should have been apparent to plaintiff's counsel at the outset of this case." *Sherman v. Chase Packaging Corp.*, No. 89-CV-1230, slip op. at 1-2, (N.D. Ohio, Oct. 22, 1990) (Batchelder, J.), *aff'd* No. 90-4033, slip op. (6th Cir. May 21, 1991). That Court then granted summary judgment in favor of the defendants on all counts. Sherman appealed the district court's order, and while the appeal was pending, initiated the instant action. Since that time, the Sixth Circuit has affirmed the district court in all respects. In reviewing Sherman's motion for leave to file a second amended complaint, the Court of Appeals noted that "[t]he district court concluded that the facts which formed the basis of plaintiff's 'new claims' were known to him from the time the original complaint was filed and should have been apparent from the outset. We agree." *Sherman v. Chase*

Appendix D

Packaging Corp., No 90-4033, slip op. at 4 (6th Cir. May 21, 1991).

In this action, Sherman complains of damages stemming from false representations made by Chase Packaging, the same defendant in Sherman's prior case, but Sherman also names as defendants William Ludington, Chase's president, as well as Union Camp and Bag Merger, two companies that have merged and/or acquired Chase. The misrepresentations complained of in Sherman's present case were allegedly made upon Sherman's termination from employment, the same termination that served as the basis for Sherman's complaint in his first case. Defendants now ask that the instant complaint be dismissed, based on the doctrines of res judicata and collateral estoppel.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

The nature of materials properly presented in a summary judgment pleading is set forth in Federal Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence,

> and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in the light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Assn., Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving

party] is entitled to a verdict." *Id.* at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

III.

Because this action is based on federal diversity jurisdiction, state law determines the applicability of res judicata and collateral estoppel. *Miqra v. Warren City School District Board of Education*, 104 S. Ct. 892 (1985); *Hackler v. Indianapolis & Southeastern Trailways*, 437 F.2d 360 (6th Cir. 1971). Ohio law holds that "a prior judgment, to have res judicata effect, must involve the same issues, and the same parties as the later proceeding." *Quality Ready Mix v. Mamone*, 520 N.E.2d 193, 197 (Ohio 1988). Because Sherman's instant complaint invokes the same issues and the same parties as those presented in his earlier decided case, Sherman's present claims are barred by res judicata.

A. Issues Presented

The Supreme Court of Ohio has set forth a three part test to determine whether the issues presented in a cause of action in one case should be barred by final judgment in a previous case, res judicata should be applied unless the second cause of action involves different operative facts, different evidence to prove those facts, or a different time of accrual of the claims involved. *Norwood v. McDonald*, 52 N.E.2d 67, 73 (Ohio 1943).

This Court is not persuaded that any of these three tests have been met by Sherman. In his earlier case, Sherman submitted a brief in opposition to defendant's motion for summary judgment that

referred repeatedly to promises and representations made by Chase and Ludington. For example, Sherman claimed that "Chase's president, Wm. Ludington specifically told plaintiff in January 1989 that if any openings occurred he would be the first person called" and that "this representation was breached." Plaintiff's brief in opposition to motion for summary judgment at 12, 19, *Sherman*, No. 89-CV-1230, slip op. (N.D. Ohio, Oct. 22, 1990), *aff'd*, No. 90-4033, slip Op. (6th Cir. May 21, 1991). This claim is the same as that alleged in Sherman's present complaint, *i.e.*, that "representations [were] made by Ludington that [Sherman] would be contacted when the first opening came up at Chase." Complaint at 3. The operative facts in these two complaints do not differ. Moreover, Sherman's present effort to introduce evidence of a telephone conversation during which the alleged misrepresentations were made does not involve any new or different evidence; Sherman admits he referred to the same telephone conversation in his first case. Plaintiff's brief in opposition to defendants joint motion for summary judgment at 10. The fact that Sherman was allegedly terminated on one day and then promised first chance at a new position several days later does not lead to the conclusion that his claims arose at different times; such an interpretation is absurd. It is clear that the operative facts took place during a short period of time, and that Sherman was aware of all these facts when he filed the complaint that was the basis of his first case.

Sherman's present complaint is essentially the same claim that Sherman tried unsuccessfully to amend in his complaint in his earlier case. The trial judge did not permit Sherman to present his claims of negligent and intentional misrepresentation in that case, and was affirmed by the Court of Appeals. *Sherman v. Chase Packaging Corp.*, No. 89-CV-1230, slip op. (N.D. Ohio Oct. 22, 1990) (Batchelder, J.), *aff'd*, No. 90-4033, slip op. (6th Cir. May 21, 1991). The doctrine of res judicata prevents him from presenting

them now. "The principle of res judicata bars a subsequent action between the same parties and based upon the same cause of action and renders the judgment in the preceding action conclusive as to all germane matters that were or could have been raised therein." *Anderson v. Richards*, 179 N.E.2d 918, 920 (Ohio 1962) (quoting syllabus in *Pollock v. Cohen*, 32 Ohio St. 514 (1877)).

B. Parties Presented

As noted above, res judicata bars a subsequent action between the same parties. Sherman's first case named only Chase Packaging Corporation as a defendant, while this case names William Ludington, Chase Packaging Corporation, Bag Merger Corporation, and Union Camp Corporation as defendants. Any liability of William Ludington, however, is premised on his position as president of Chase. It is settled under Ohio law that a judgment in favor of a corporation bars a later action against an employee of that corporation who was acting within the scope of his employment. *Melchion v. Burkart*, 87 N.E.2d 372 (Ohio Ct. App. 1948). As for Union Camp and Bag Merger, any liability is premised on their being successors in interest to Chase by virtue of having merged with or acquired Chase. Ohio law applies res judicata in such instances of privity as well. *Galbraith v. Hixson*, 512 N.E.2d 956, 958-59 (Ohio 1987). Because William Ludington, Bag Merger Corporation, and Union Camp Corporation are all in privity with Chase Packaging Corporation, res judicata applies to bar this action against them as well.

IV.

This Court finds that no genuine issue of material fact exists. Since the instant action is barred by the doctrine of res judicata, Ludington is entitled to judgment as a matter of law. Thus,

defendants' joint motion for summary judgment is granted, and judgment is entered in favor of the defendants.

IT IS SO ORDERED.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

APPENDIX E - APPELLANT'S BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 91-3936

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY E. SHERMAN

Plaintiff-Appellant,

vs.

WILLIAM F. LUDINGTON;
CHASE PACKAGING CORPORATION;
UNION CAMP CORPORATION;

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIEF OF PLAINTIFF-APPELLANT

I. ISSUE PRESENTED

Whether a complaint alleging fraud is barred under the

doctrine of *res judicata* where the fraud claim was previously not allowed to be brought as part of an amended complaint in a prior action based on violations of ADEA, ERISA and state discrimination and contract law and where the fraud claim is a different cause of action which involves different wrongful acts and evidence.

II. STATEMENT OF THE CASE

Appellant Roy Sherman filed a lawsuit on June 27, 1989, alleging wrongful discharge and age discrimination and a purposeful interference with employment benefits in violation of the Employee Retirement Income Security Act ("ERISA"). (R. 14: Memorandum by Plaintiff in Opposition to Motion for Summary Judgment; Exhibit B, Complaint, 6-27-89.) The trial court granted summary judgment on those claims and this Circuit Court affirmed. (*Id.* at Exhibit C, Memorandum of Opinion, 10-22-90; Exhibit D, Opinion, 5-21-91.)

In the first lawsuit (hereinafter "*Sherman I*") Sherman's rights were founded upon rights from his 26-year employment with the Defendant Chase Packaging Corporation. Mr. Sherman was terminated on January 5, 1989. He claimed in the first suit that age was a factor in the discharge, that promises regarding discharge for just cause had been breached, and that he was wrongfully deprived of employment benefits in violation of ERISA. (R. 14, Exhibit B, Complaint, 6-27-89.) Those claims all involve the decision to discharge Mr. Sherman and representations made to him prior to the discharge.

The present suit (hereinafter "Sherman II"), filed originally in state court on March 21, 1991 and removed to federal court on April 10, 1991, involves an entirely different cause of action as is

appropriately determined by the evidence and the wrongful acts at issue. (R. 1, Notice of Removal, Exhibit A, Complaint, March 21, 1991.) *Subsequent to the discharge*, the president of Chase, William Ludington, made fraudulent misrepresentations to Roy Sherman regarding his future employment with Chase. Ludington expressly told Sherman that he would be contacted as soon as an opening arose: "If one [a position] develops, you're the first guy I'm gonna call;" "I can give you the first call on anything that opens up, and I'll do that;" and "if . . . something else comes up here, I'll call you." The phone conversation in which the misrepresentations were made was tape-recorded, a transcript of which is appended hereto. (R. 14, Memorandum by Plaintiff in Opposition to Motion for Summary Judgment, Exhibit A.)

Sherman relied on those representations to his detriment. In reliance on the deceitful and reckless statements made to him that he would be called, he did not re-contact the company regarding work. In fact, openings arose for which Sherman was undisputedly qualified. However, he had never been contacted and therefore never applied for these positions, nor did he pursue his rights in connection with those vacancies and was thereby injured. (R. 12, Exhibit B, Motion for Leave to File Second Amended Complaint and Brief in Support; R. 12, Exhibit C, Second Amended Complaint.) Then, Sherman learned through discovery in his prior lawsuit, that openings did arise for which he was qualified and that those positions were filled by others. *Id.* After he learned of Ludington's deceit, a Motion to Amend the Complaint was filed. *Id.* That Motion was denied. (R. 12, Exhibit E, Memorandum of Opinion, 10-22-90.) Therefore, the fraud claim was never pending in the first action and consequently was never litigated.

The statute of limitations on fraud under Ohio law is four years. Ohio Revised Code 2305.09. This complaint alleging fraudulent and negligent misrepresentation in connection with events

subsequent to the discharge was therefore timely filed. (R. 1, Complaint, 4-10-91.)

On September 10, 1991, the trial court granted Defendants' Motion for Summary Judgment on the grounds that the doctrine of *res judicata* barred this lawsuit. (R. 27: Memorandum, Opinion, and Order granting Motion for Summary Judgment, 9-10-91; R. 28: Order granting Summary Judgment, 9-10-91.) Appellant claims that the judgment was erroneous because the doctrine of *res judicata* does not bar claims which constitute a different cause of action than those previously litigated.

III. LAW AND ARGUMENT

A. Introduction

The trial court's opinion in this case is, for some inexplicable reason, a simplistic, erroneous consideration of the sometimes complex doctrine of *res judicata*. The trial court essentially relied on one Ohio case, (*Norwood v. McDonald*, 142 Ohio St. 299 (1943)), albeit an important one, and misstated or misunderstood its contents. The trial court cited the wrong test from *Norwood* and failed to understand that *Norwood* is but one of many cases which explains the "same evidence" or "proof" test to determine when *res judicata* applies, consistent with the "primary right" test adopted earlier by the Ohio Supreme Court. Under either of those tests, *Sherman II* is a different cause of action than *Sherman I* and is not barred. The trial court did not mention either of these tests, each with a wide body of jurisprudence, and each developed to determine the precise issue before the court.

Additionally, the trial court mistakenly concluded that because overlapping facts exist, the cause of action is the same, which is not the law. The trial court further failed to recognize that the same

subject or transaction can give rise to different causes of action to which *res judicata* does not apply.

Finally, the trial court failed to apply basic *res iudicata* principles. For one, the trial court neglected to consider that the doctrine should be used sparingly because of its harsh results. Also, the trial court failed to consider that it was the Defendants' burden to prove the affirmative defense of *res judicata*. Moreover, the trial court did not question the lack of careful and thorough consideration, in a due process sense, of the claims sought to be precluded, an absence of which is considered to jeopardize a party's seventh amendment right to trial by jury.

Appellant never had his day in court on the present claims. He has rights in connection with these claims pursuant to the laws of the State of Ohio. The claims were never heard, never considered, never decided. Accordingly, Appellant should be permitted to proceed with this action.

B. Basic Principles of *Res Judicata*

The issue before the court is whether the doctrine of *res judicata* operates to bar appellant Roy Sherman's cause of action. Although the doctrine of *res judicata* is said to be a "necessary judicial development involving considerations of finality and multiplicity," it is equally true that "it should not be permitted to encroach upon fundamental and imperative rights." *Goodson v. McDonough Power Equip. Co.*, 2 Ohio St. 3d 193, 198-199 (1983). *Res judicata* is to be applied in particular situations "as fairness and justice require," and "not to be applied so rigidly as to defeat the ends of justice or so as to work injustice." *Id.* at 202. As an "absolute due process requirement," the party asserting the defense of *res judicata* has the burden of showing with clarity and certainty that the identical issue and cause of action was "actually litigated,

directly determined, and essential to the judgment in the prior action." *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1268 (6th Cir. 1986); *quoting Goodson v. McDonough Power Equip.*, 2 Ohio St. 3rd 193, 200-201 (1983).

It is well settled that *res judicata* does not operate as a bar where "the subsequent action is based upon *a different cause of action* from that upon which the prior action was based." "*Where the cause of action is different, the judgment in the first action is not conclusive as to matters which might have been but were not litigated and determined in the prior action.*" *Henderson v. Ryan*, 13 Ohio St.2d 31 (1968) (emphasis added). As the United States Supreme Court has stated: "The definition of 'cause of action' or 'claim' is critical in the present context because it seems that a basic rule of Ohio law is that a person is entitled to one lawsuit for each 'cause of action' he possesses." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 86 (1985).

Thus, the critical issue and the determinative issue before this Court is whether the present suit involves a different cause of action than that involved in the prior judgment. Appellant maintains that it does, and simply that fraud subsequent to a discharge is a different cause of action from breach of contract or age discrimination leading to a discharge, and therefore, this claim is not barred.

C. Under The Primary Rights Test, Which Is Appropriate In This Case, *Sherman II* Constitutes A Different Cause of Action Than *Sherman I*

In determining what "constitutes a cause of action," the Ohio Supreme Court has previously adopted what has been called the "primary right – primary duty" concept propounded by John Norton Pomeroy. *See* J. Pomeroy, *Code Remedies* § 347 (5th ed., 1927); *Henderson v. Ryan*, 13 Ohio St.2d 31, 34-35 (1968).

Under this analysis, " 'the facts from which the plaintiffs primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's deceit or wrong' give rise to a cause of action." *Henderson* at 34, *quoting* Pomeroy at § 347. The focus of the test is with the "wrongful act not with the theory of recovery." *Henderson* at 34.

As noted by Pomeroy:

> An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one — which is to say an obligation . . . The action therefore springs from the obligation, and hence the 'cause of action' is simply the obligation . . . . The cause of action is therefore to be distinguished, also, from the "remedy" which is simply the means by which the obligation or the corresponding action is effectuated — and also from the relief sought.

Pomeroy, § 348, p. 529, n.49.

Thus, "that several remedies may be available for violation of one 'primary right' does not create additional causes of action." Likewise, "a given set of facts may give rise to the violation of more than one 'primary right,' thus giving a plaintiff the potential of two separate lawsuits against a single defendant." *Sawyer v. First Financial Corp.*, 177 Cal. Rptr. 398, 403; 124 Cal. App.3d 400 (1981).

A primary rights analysis is appropriate under Ohio law as set forth in *Henderson v. Ryan*, 13 Ohio St. 2d 31, 34-35 (1968). In that

case the court described the three general views regarding the means to define "cause of action." In so doing, the court quoted from Pomeroy in describing the primary right test. Under this definition of cause of action, the Court stated:

> [T]he facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with facts which constitute the defendant's delict or act of wrong give rise to a cause of action. This concept... is concerned with the wrongful act and not with the theory of recovery....
>
> *This Court has previously adhered to the "primary right – primary duty" concept looking* to the defendant's wrongful act... [T]he reasoning of the case, that two duties were breached, one owed to the decedent and the other to his widow and next of kin is still valid.

Henderson v. Ryan, 13 Ohio St. 2d, 31 at 35 (1968), (emphasis added).

Under a "primary rights" analysis, Roy Sherman is not barred from proceeding with this suit. A review of other cases in which the identical issue has arisen is instructive. For example, in *Agarwal v. Johnson*, 25 Cal. 3d 932, 160 Cal. Rpt. 141, 603 P.2d 58 (1979), the plaintiff sued for backpay pursuant to Title VII of the Civil Rights Act of 1964. The state supreme court determined that the second suit for defamation and intentional inflection of emotional distress was not barred.

Appendix E

As one court interpreted the decision:

> Although the same set of facts is presented in each claim, one primary right is created by the federal statute prohibiting discriminatory employment practices; and the second primary right is grounded in state common law. Also, the "harm suffered" was deemed separable — damages for lost wages in the federal action, and damages for injury to reputation and peace of mind in the state case.

Sawyer v. First City Financial Corp., 124 Cal. App. 3d 400; 177 Cal. Rptr. 398, 403 (1981).

In *Sawyer, Id.*, using a primary rights analysis, the court held that the second lawsuit was not barred by *res judicata*. The first lawsuit was based on breach of contract; the second lawsuit based on fraud. As the court stated:

> Surely one's breach of contract by failing to pay a note violates a "primary right" which is separate from the "primary right" not to have the note stolen. . . . While the monetary loss may be measured from the same promissory note amount, and hence in a general sense the same "harm" has been done in both cases, theoretically the plaintiffs have been harmed differently by tortious conduct destroying the value of the note, than by the contractual breach of simply failing to pay it. We conclude therefore that *Sawyer* is based upon a separate and severable cause of action from that litigated in Sawyer *I*, and that it was error to

> grant summary judgment on the ground of *res judicata.*

Id. at 405.

The question presented then, is as noted by Pomeroy: "What right of the plaintiff has the defendant invaded?" Pomeroy, § 351 at 537. Put another way, as stated by the Ohio Supreme Court using this analysis: "We are obliged, then, to determine whether the case now before us involves the same wrongful act as that from which the defendant was exonerated by the former judgment between these parties." *Henderson* at 35.

The primary right in *Sherman I* involved his right to be free from discrimination and wrongful deprivation of benefits derived from federal law. It also involved the primary right to have employment contracts enforced. The alleged wrongful acts involved discrimination and breach of contract in connection with a discharge. The primary right in *Sherman II* involves the right to be free from fraud and deceit, and specifically fraud and deceit which occurred at a different time than the wrongful conduct at issue in *Sherman I.* The wrongful act in *Sherman II* involves fraudulent misrepresentations made by the defendant and relied upon subsequently by the Plaintiff. Because the primary rights and wrongful acts are not the same, the cause of action is not the same, and this suit is not barred.

These principles have been applied in numerous Ohio cases. For example, in *Karam v. Allstate Insurance*, 27 Ohio App.3d, 137 (1985), the plaintiff brought an action against the defendants and the estate of Rose Karam to recover damages and medical expenses in connection with an automobile accident. The Supreme Court held that the doctrine of parent-child immunity prohibited the action for negligence against the estate of Rose Karam. The court

also held that the original dismissal of the insurance companies was error, but not prejudicial considering its holding on parental immunity. Plaintiffs then filed a declaratory judgment against Allstate Insurance Company for benefits under the uninsured motorists provisions on both policies. The trial court held in favor of the plaintiffs. Defendants argued that the trial court erred by failing to apply the doctrine of *res judicata*. In affirming the trial court's judgment, the appellate court stated:

> . . . *Res judicata* acts to bar relitigation of the same cause of action between the same parties. A final judgment or decree in an action, however, does not bar a subsequent action or where the causes of action are not the same even though each action relates to the same subject matter. *Whitehead v. Gen. Tel. Co.*, (1969) 20 Ohio St.2d 108, par. two of syllabus . . .
>
> . . . The first case was a tort action against the estate of Rose Karam and the insurers based on the alleged negligence of Rose Karam. This action on the other hand is based on the contract provisions providing for uninsured motorist benefits. Considering the principles set forth in *Whitehead, supra, res judicata* does not bar this action.

Karam v. Allstate Ins. Co., 27 Ohio App.3d 137, 140 (1985). *See also Leonard v. Murdock*, 147 Ohio St.103, 108 (1946) ("*Leonard v. Glenn Cartage* sounded in tort, the present actions sounds in contract. We are persuaded that the doctrine of *res judicata* has no application here.")

Appendix E

In *Krahn v. Kinney,* 43 Ohio St. 3d 103 (1889) the Ohio Supreme Court again reiterated the principles of the Ohio law of *res judicata* stating that the doctrine does not apply "where the causes of action are not the same even though each action relates to the same subject matter." The *Krahn* plaintiff filed a legal malpractice claim against an attorney upon whose conduct she previously moved to vacate a criminal judgment on the grounds of ineffective assistance of counsel. The trial court granted summary judgment for the defendant on *res judicata* grounds. The Supreme Court reversed and held:

> [T]he Appellants contend that appellee Krahn's malpractice suit is barred by the doctrine of *res judicata*. . . .
>
> An action to vacate a criminal judgment based on ineffective assistance of counsel is not the same as a cause of action for legal malpractice. A claim of ineffective assistance of counsel is based on constitutional guarantees and seeks reversal of a criminal conviction. Legal malpractice is a common-law action grounded in tort which seeks monetary damages. The proof of either of these two causes of action does not necessarily establish the other. . . . Thus the issues presented in the malpractice action were not "actually and necessarily litigated and determined" in the denial of her motion to vacate the criminal judgment against her. *See Goodson supra.*
>
> For these reasons the trial court erred in granting summary judgment for the appellants.

> We affirm the judgment of the court of appeals and remand the cause to the trial court for further proceedings.

Krahn at 106-109.

Thus, even though the subject matter may be similar, where the primary rights and wrongful acts are different, a different cause of action has been stated. *Sherman I* and *Sherman II* involve different primary rights and different wrongful acts. Therefore, the trial court erroneously invoked the principles of *res judicata* to bar this claim.

D. Under The "Same Evidence" Test, Which Is Also Appropriate In This Case, *Sherman II* Is Not Barred.

It should also be noted that the Ohio courts often consider the "same evidence" test to determine whether the cause of action is the same. This test is consistent with the Pomeroy primary rights test.[1] As the Ohio Supreme Court phrased it:

> Whether different proofs are required to sustain the two actions is said to be the best and most accurate test... In fact, it has been said to be an infallible test.

Norwood v. McDonald, 142 Ohio St. 229, 309 (1943).

As an Ohio appellate court noted:

> If it is doubtful whether a second suit is for the

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1. As noted in Pomeroy: "It is apparent that each cause of action arose, and indeed must necessarily have arisen, out of the doing of quite different things by defendant . . . *The same evidence would not sustain each cause of action*, and they may require different answers." Pomeroy, *Code Remedies* at § 360 (emphasis added).

> same cause of action as the first, it is a proper test to consider whether the same evidence would sustain both. This method has been called the best and most accurate test.

Wharton v. Pollack, 49 Ohio App. 443, 446 (1934).

The court in *Wharton* held that a judgment in a personal injury assault case against a landlord did not bar a claim for breach of contract caused by a simultaneous verbal order regarding vacating the premises resulting in plaintiff's wrongful eviction. Using the "same evidence" test, the *Wharton* court determined that *res judicata* did not apply. "The fact that these two claimed acts were nearly simultaneous does not make them one act or transaction." *Id.* at 446.

Other states, like Illinois, use the same analysis and have held in strikingly similar circumstances that an added fraud claim, for example, would not and should not be barred. In *Pfeiffer v. William Wrigley Jr. Co.*, 139 Ill. App. 3d 320, 484 N.E. 2d 1187 (1985), a former employer whose earlier action against his employer for age discrimination was dismissed, brought a second action sounding in fraud, claiming that he was forced to retire at age sixty-five. Defendant then filed a motion to dismiss claiming that the second action was barred by the doctrine of *res judicata*. The court, in holding that *res judicata* did not bar the claim, stated as follows:

> A close examination of the proof required in plaintiff's two suits reveals that the same evidence would not sustain both suits and that the facts essential to one case would not be essential to the other.
>
> Principles of judicial finality and judicial

economy behind *res judicata* do not mandate that plaintiff's failure to join them in his initial suit should bar the present suit where the necessary proof and underlying facts in the two suits are different.

Clearly, plaintiff's suit for fraud does not flow from the same conduct complained of in plaintiff's earlier suit, and does not seek to remedy separate injuries which occurred at different times during plaintiff's seven-year employment relationship with the Wrigley Company.

In conclusion, applying either a "necessary evidence" approach or a "transactional" approach, plaintiff's State and Federal suits do not involve the same cause of action and therefore, *res judicata* principles are inapplicable. Accordingly, we hold that plaintiff's current action sounding in fraud is not barred by the Federal court's dismissal of plaintiff's previous action brought under the ADEA.

Pfeiffer v. William Wrigley Jr. Co., 484 N.E. 2d 1187, 1190-1191 (1985).[2]

---

2. *See also,* for illustrative purposes, the *Restatement of Judgments,* Second, § 24, Illustration 8: "A, under a contract of employment with B, is discharged from the job on the alleged ground of his technical incompetence. A year later B, in response to an inquiry from C, a prospective employer of A, states that A is an habitual drunkard. A may sue B and recover against him for wrongful discharge without thereby forfeiting his right to sue B on the basis of his report to C."

Likewise, the same evidence in *Sherman I* does not sustain the fraud claim in *Sherman II*.[3] Fraud is clearly not the same as age discrimination. Additionally, the Ohio Supreme Court has specifically held that the same evidence does not sustain fraud and promissory estoppel in relationship to a discharge, the other claim litigated in Sherman I. *See Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100 (1985). Similarly, in *Russ v. TRW*, 59 Ohio St. 3d 42, 50 (1991), the Ohio Supreme Court held:

> While the court of appeals affirmed the jury determinations with respect to the claims of fraud and intentional infliction of emotional distress, it reversed the verdict in favor of appellee on the promissory estoppel claim. We are in agreement with this disposition.

Russ v. TRW, 59 Ohio St. 3d 42, 50 (1991).

Thus, since "two causes of action differ if the same evidence does

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3. The elements of fraud are: "(a) a representation or where there is a duty to disclose concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon a representation or concealment, and (f) a resulting injury proximately caused by the reliance." *Bellios v. Victor Balata Belting Co.*, 724 F.Supp. 514 (S.D. Ohio 1989), *quoting Cohen v. Lamklo. Inc.*, 10 Ohio St. 3d 167 (1984).

The definition of negligent misrepresentation is: "One who in the course of his business profession or employment or in any other transaction in which he has a pecuniary interest supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Delman v. The City of Cleveland Heights. et al.*, 41 Ohio St. 3d 1 (1989).

not support both," Sherman's present suit should not be barred. *Sharp v. Shelby Mutual Ins. Co.*, 15 Ohio St. 2d 134, 140 (1968).

E. Overlapping Evidence Does Not Mean That The Causes of Action Are The Same For Purposes Of Res Judicata

While the issue is whether the same evidence would sustain both suits, it is also true that *res judicata* will not apply to bar a second suit simply because there may be overlapping evidence, or evidence in common to both causes of action. Thus, the fact that the Ludington/Sherman conversations were mentioned in *Sherman I* does not mean that the same evidence would sustain both suits as required in order for the harsh doctrine of *res judicata* to operate.

For example, in *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), the defendant attempted to bar a Title VII retaliation in employment claim because previous Title VII claims pertaining to her employment had been litigated against the same parties. The defendant argued that the pending case should be barred because some of the testimony in *Wu I* included retaliatory actions taken by the university. The Circuit Court of Appeals disagreed:

> . . . In reviewing the district court's decision, we focus on the requirement that the "same cause of action" be at issue in both suits.
>
> In this case, the district court seems to have believed that the retaliation claims at issue in the present litigation were resolved by Wu I. We can find no basis for this belief. Neither the pleadings nor the pretrial order in *Wu I* show any indication that Kathleen Wu raised a retaliation claim. Appellees' counsel admitted this in oral argument before us, but maintained

> that because some of the testimony in *Wu I* touched on retaliatory actions taken by the university, Kathleen Wu should be deemed to have implicitly amended her complaint to include a claim of retaliation. We find counsel's argument to be completely devoid of merit. Kathleen Wu's first action did not raise a claim of retaliation; the principles of *res judicata* and collateral estoppel therefore do not bar appellants' claims, and the district court erred in so holding.

Wu v. Thomas, 863 F.2d at 1548-1549

Thus, just because Mr. Sherman mentioned the substance of the conversations in the earlier claim, does not mean that the fraud claim was litigated for purposes of *res judicata.*

Likewise, the mention of the conversations in *Sherman I* should be considered as marginal evidence, at best, with respect to those prior claims and therefore irrelevant as far as *res judicata* is concerned. The Seventh Circuit addressed this precise issue in *Welch v. Johnson*, 907 F.2d 714 (7th Cir. 1990), wherein the plaintiff filed a claim stating that she was harassed and discharged because of her sex. She later brought a claim (which she had previously attempted to add by way of amendment) stating that she had been denied a promotion due to her sex. Even though some of the evidence was the same, the court found there were two separate causes of action under the same evidence or "proof" test. *Id.* at 723. As the court elaborated:

> We reach the opposite conclusion regarding Count II of Ms. Welch's amended complaint that alleges she was denied a promotion based

solely on her sex. Ms. Welch's complaint that she was denied a promotion stands on a different footing than her claim that she was harassed based on her sex. The denial of Ms. Welch's promotion occurred *prior* to the events that formed six of the seven charges against Ms. Welch in the state discharge review proceedings. (Citation omitted.) Thus, under the "proof" test, it would have been of marginal, if any, relevance to Ms. Welch's defense to the charges against her in the state proceedings to offer evidence that she was denied a promotion *before* the occurrence of almost all of the alleged acts that formed the basis for her discharge. Conversely, the vast majority of the dismissal charges would not be relevant to a Title VII claim based on a denial of a promotion in 1983 because nearly all of the alleged events giving rise to these charges occurred *after* the alleged denial of a promotion. *Thus, because the majority of events that formed the proof in the discharge proceeding would not be relevant to a federal action based on a discriminatory failure to promote Ms. Welch in September 1983, we conclude that these are two separate causes of action under the "proof" test. . . .*

We therefore conclude that, under Illinois law, Ms. Welch's claim under Count II that she was denied a promotion in 1983 based on her sex is a separate cause of action from the state discharge review proceedings and is not barred by *res judicata.*

Appendix E

Welch, 907 F.2d 714, 722-723.

The Seventh Circuit Court also reached the same result in *LaSalle Nat. Bank of Chicago v. County of DuPage*, 856 F.2d 925 (7th Cir. 1988), another case in which there was some overlapping evidence. There the Court stated:

> . . . The proof that the plaintiffs would have to offer in this case in order to prevail is significantly different from the proof that was involved in the earlier state action . . . Thus, under the evidence test, these are two different causes of action.

Id. at 933.

The Court went on to hold that there was no preclusion because the claim was not brought earlier even though the plaintiff knew of the underlying facts. The court stated:

> Nevertheless, it is argued that, because the plaintiffs were aware of the factual basis for the present suit at the time they amended their complaint in the state action to include constitutional claims, they were obliged to bring their conspiracy complaint at that time. However, the defendants who have the burden of establishing the proposition (citation omitted) have not been able to demonstrate that the Illinois courts would consider these two factual scenarios so "closely related" (citation omitted) that they would consider a suit based on one precluded if it were not brought in the

> same lawsuit as the other. *See Benton v. Smith*, 157 Ill. App. 3d 847, 510 N.E. 2d 952, 957 (1987) (*mere overlapping of facts in two cases, but not key or operative facts, does not determine the res judicata issue*) (emphasis added).
>
> Accordingly, we conclude that the present action is not barred . . . [T]he current action does not involve the same cause of action as the previous state court suit.

LaSalle Nat. Bank of Chicago v. County of DuPage, 856 F.2d 925, 933-934 (7th Cir. 1988) (emphasis added).

Accordingly, under both federal and state law, it is well settled that simply because some evidence may be the same or overlapping in *Sherman I* and *II* does not mean that the complaints state the same cause of action. *See id. See also Henderson v. Ryan*, 13 Ohio St. 2d 31 (1968); *Leonard v. Murdock*, 147 Ohio St. 103 (1946); *Norwood v. McDonald*, 142 Ohio St. 299, 310-311 (1943) (applying the "same evidence" test under Ohio law).

F. The Sixth Circuit Court of Appeals Has Refused To Apply *Res Judicata* Principles In Similar Cases Where The Claim Did Not Receive Careful And Full Consideration In Accordance With Due Process

This Circuit Court has been loathe to apply *res judicata* principles to bar claims where those claims sought to be precluded were not given careful and adequate consideration in a due process sense. For instance, in *Cooper v. City of North Olmsted*, 795 F.2d 1265 (6th Cir. 1986), a black female bus driver brought suit alleging that her employer discharged her in violation of the Civil Rights Act because of her race and sex. Because the issue of whether or not

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Cooper had been terminated for just cause had previously been litigated adversely for the plaintiff, the defense asserted that her subsequent discrimination claim was barred. Relying on Ohio law, the *Cooper* court held that the state court judgment was not preclusive:

> More recently, Justice Holmes, writing for the Ohio Supreme Court in *Goodson v. McDonough Power Equip., Inc.*, 2 Ohio St.3d 193, 200-01, 443 N.E.2d 978 (1983), stated:
>
> > The main legal thread which runs throughout the determination of the applicability of *res judicata*, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be "heard" in the due process sense. Accordingly, an absolute due process prerequisite to the application of collateral estoppel is that the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment in the prior action.
>
> (Citations omitted.) Therefore, the City must prove that the issues of race and sex discrimination were actually and directly at issue in the prior state proceedings, and that they were essential to the judgment of the state court against Cooper.

Id. at 1269.

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Finding that the race and sex discrimination claims were not considered, this Court held that Cooper's discrimination claims were "not barred by the prior state proceedings." *Id.* at 1269.

In *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), this Court again reached the same conclusion. In *Barnes*, the plaintiff sued his employer alleging that he was discharged in retaliation for engaging in constitutionally protected speech. In a previous case involving state court and administrative proceedings, it was found that Barnes had engaged in sexual harassment and the dismissal to discharge him on that ground was upheld. Barnes' subsequent federal suit was thrown out by the district court based on the previous state proceeding. This Circuit reversed, holding that neither the doctrine of claim preclusion nor issue preclusion barred Barnes' federal claim. The Court stated:

> Barnes's section 1983 action to redress the alleged violation of his right to free speech is not the same cause of action as the state action in which he sought judicial review of an administrative decision. Accordingly, the doctrine of claim preclusion does not prevent Barnes from proceeding with his federal claim.
>
> When the Kentucky state courts reviewed Barnes's discharge, the only matter determined was whether the Board's factual finding that the discharge was justified because Barnes had engaged in sexual harassment was supported by substantial evidence in the record. Whether the defendants' motivation for the discharge was unconstitutional simply was not an issue in the state judicial proceedings. Thus, because

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> Barnes's section 1983 action involves a constitutional issue which was not involved in the state proceedings, the district court erred in concluding that the doctrine of issue preclusion bars further litigation of Barnes's federal claim.

Barnes v. McDowell, 848 F.2d 725, 731 (6th Cir. 1988).

Similarly, in *Tipler v. E.I. duPont deNemours and Co.*, 443 F.2d 125 (6th Cir. 1971), this Court yet again refused to apply *res judicata* principles to a Title VII claim which had not been adequately considered in the prior proceeding. As to the principles involved, the *Tipler* Court of Appeals stated:

> Where there is a second action between parties, or their privies, who are bound by a judgment in a prior suit, but the second involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determinations of which the initial judgment initially depended. (Citation omitted.)

Id. at 128.

The *Tipler* Court also held that since the NLRB hearing "did not fully explore the racial aspects of the case" and "did not adequately consider the facts necessary for a Title VII violation," "it would be anomalous if a finding under one should preclude a determination under the other absent special considerations." *Id.* at 129.

Thus, according to this Circuit, it is an "absolute due process prerequisite" that "the party asserting the preclusion must prove that the identical issue was actually litigated, directly determined, and essential to the judgment." *Cooper*, at 1269. The Defendants in this case simply cannot meet this burden. The issue of whether representations were made to Sherman which were fraudulent was never fully or adequately considered at all. Certainly, Sherman did not receive a fair opportunity to fully litigate and be heard in a due process sense as required in this Circuit.. Due process therefore demands that the district court's ruling be reversed.

G. Appellant Should Not Be Barred From Preventing A Claim Which He Attempted To Present In A Motion To Amend In The Former Suit Sinco The Claim His Never Been Adjudicated on The Merits.

It should further be noted that the procedural setting in which this claim arises, that is, following a denial of a motion to amend, makes no difference with respect to claim preclusion. *See, e.g., Nilsen v. City of Moss Point. Miss.*, 674 F.2d 379 (5th Cir. 1982). In *Nilsen*, the Fifth Circuit Court of Appeals addressed the identical procedural issue present here in the case of a plaintiff who brought a 42 U.S.C. §1983 claim subsequent to the denial of a motion to amend a previous federal complaint to allege the 1983 action. In the first suit, summary judgment was granted on a Title VII claim arising from a discrimination in employment claim. In the second suit, the defendant claimed that the 1983 claim should be barred because of the previous judgment. In rejecting the Defendant's position, the *Nilsen* Court heid:

> . . . Nilsen attempted to assert her claims by amending her complaint. . .
>
> Nilsen cannot be barred on the theory that she should have brought her 1983 claim in

> Nilsen II when she attempted to do so and leave to amend was denied.
>
> Nilsen's claim could not have been presented in the first action by virtue of the court's refusal to entertain those claims in that action. In such circumstances we refuse to give preclusive effect to Nilsen II/III on Nilsen's §1983 claims.

Nilsen v. City of Moss Point Miss., 674 F.2d 379, 385-386 (8th Cir. 1982).

The preceding authorities and basic principles of fairness dictate that Sherman should not be punished for being prevented from trying to amend his first complaint; this is especially so since the district court's reasons for having denied Sherman leave to amend had absolutely nothing whatsoever to do with the theory or principles of *res judicata*. It is well established that "only a judgment on the merits can be ***res judicata***," and that a denial for leave to amend a complaint is not a judgment on the merits as to that claim. *See, e.g., Gibson v. Summers Construction Co.*, 163 Ohio St. 220, 229 (1955). *See also, e.g., McNellis v. First Federal Savings and Loan Assoc. of N.Y.*, 364 F.2d 251, 256 (2nd Cir. 1966) (since the proposed amended complaint involved a different cause of action than those asserted in the original complaint, there was not "a judgment on the merits of that complaint sufficient to justify application of *res judicata* rules."); *Sierra Club v. Secretary of Transportation*, 779 F.2d 776, 780 (lst Cir. 1985) ("[I]t would not be proper to treat this denial [of leave to amend the complaint] as precluding a second action.") Accordingly, the district court herein erred in granting summary judgment as to the Defendants.

H. Collateral Estoppel Only Precludes Issued That Were Actually Litigated And Essential To The Judgment.

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Appellee has continuously alleged that collateral estoppel applies in this case, when in fact, the doctrine has nothing whatsoever to do with this case. Collateral estoppel only precludes issues which have actually been litigated. *Taylor v. Monroe*, 158 Ohio St. 266, 273 (1952). Simply stated, the issue of fraud has never been litigated; therefore, collateral estoppel does not apply.

Collateral estoppel does not preclude litigating issues involving some of the same facts presented in a prior suit, unless those facts or issues were essential to the first judgment. In *Kelly v. Georgia-Pacific Corp.*, 46 Ohio St. 3d 138 (1989), the plaintiff filed suit in federal court including federal ERISA and ADEA claims, and state claims of wrongful discharge, breach of the covenant of good faith and fair dealing, breach of contract, promissory estoppel, defamation, and negligent termination. The federal court decided the federal claims on summary judgment against the plaintiff, and then refused to exercise pendent jurisdiction over the state claims. Thereafter, the plaintiff refiled in state court his claims of breach of express contract, breach of implied contract (promissory estoppel), and negligent termination. The Ohio Supreme Court held that the latter suit was not precluded by collateral estoppel, stating as follows:

> The Court notes that the company gave Kelly only two weeks notice that it intended to eliminate the Ohio sales region, and that it intended to eliminate Kelly's job. Arguably, the company might have discharged the plaintiff in a more fair manner, but lack of fairness does not in itself give rise to an inference of discrimination.
>
> This same lack of fairness may nevertheless give rise to a state claim under

> identical facts. Thus, the decision on the federal claims will not result in issue preclusion in a subsequent state proceeding.
>
> We therefore conclude that where a determination in a prior federal action was not essential to the judgment obtained therein, collateral estoppel will not foreclose consideration of the issue in a subsequent state proceeding involving a different claim for relief.

Kelly v. Georgia-Pacific Corp., 46 Ohio St. 3d at 138.

The current suit is strikingly similar to *Kelly*. The only fact marginally raised in the first suit, relevant to this suit, is the existence of the phone conversation. A thorough review of the district court's opinion in *Sherman I* reveals that the only reference to the evidence of the phone conversation at issue in this case was stated as relating to the discriminatory motive in the discharge. The district court in *Sherman I* expressly stated that the only "pertinent question with respect to this evidence is whether it is relevant to prove discriminatory discharge." (R. 14, Exhibit D, Memorandum of Opinion, October 22, 1990.) There is no question then, that the fraudulent phone conversation was solely considered within the context of age discrimination.

The fraud claim involved in this suit "was not essential to the judgment obtained" in the prior suit. Kelly at 138. At best, as stated earlier, it constituted marginal evidence. The application of collateral estoppel is limited to the issues actually litigated, within the context in which they were litigated. Such is not the case here with respect to *Sherman I* and *Sherman II*.

Hence, this Court, consistent with the previous rulings of this Circuit and the overwhelming majority of other authorities, should not preclude Plaintiff's claim.

IV. CONCLUSION

WHEREFORE, for all of the reasons set forth above, Appellant respectfully requests that the judgment of the district court be reversed and that this case be remanded for further proceedings.

Respectfully submitted,

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